THINKING BEYOND TOMORROW

Organizing, Planning & Settling Your Estate
8th Edition

Formerly: The Senior Texan Legal Guide

Paul Premack, JD
Certified Elder Law Attorney
Licensed to Practice Law in Texas

Benjamin Premack, JD
Master of International Affairs
Licensed to Practice Law in Washington and Colorado

Country of origin: United States of America

Distributed by
Longview Publishing, San Antonio, Texas

Introduction

The Eighth Edition of this book, now called “Thinking Beyond Tomorrow,” provides valuable information on Organizing and Planning your Estate, and on how to Settle an Estate. It covers traditional legal concepts and emerging legal areas like non-traditional relationships and same-sex marriages. Most of the focus is on Texas and Washington state law and on Federal law. This book is not intended to replace individualized legal representation. Use this book to gain background knowledge and then seek individualized legal advice from your own estate planning or Certified Elder Law Attorney.

The law will change after this edition reaches you. Be sure to consult your own attorney before you act on any topic discussed in this book. Your purchase of this book does not make us your attorneys.

Online legal information and online documents can be dangerous. The internet is a good place to start, but it should never replace individualized legal advice from an attorney. Never obtain legal forms from unlicensed websites or institutions practicing law without a license; rather, seek proper and enforceable legal documents through a licensed attorney. Whether legal documents are *delivered* personally or on the net, they must always be *written and tailored by your lawyer* to meet your specific needs and circumstances.

Paul Premack, JD, CELA

Benjamin Premack, JD, MIA

Table of Contents

PART 1: Estate Planning for Families and Spouses

Family can be viewed through many lenses. Socially, family has been called the foundation of civilization. Various religions give it sacred status. The "family laws" passed by the various States generally ignore the emotional side of families, focusing on how families begin, how they operate, and how they end. This part will examine laws on martial property, management agreements, divorce and Grandparents' rights.

MARRIAGE

The Legal Side of Marriage

Many people do not examine legal issues prior to getting married. Young adults who have a bright future but few assets often marry without a clear plan for the future. They can prosper, if they have time to make plans together as the years pass. Major life milestones – like having children or buying a house – should spur young spouses to seek legal planning. By contrast, older

adults who may already own homes and have children, need legal planning before they get married.

Marriage was traditionally seen as between one man and one woman. The law has grown as many in our society have accepted other marriage arrangements.

Marriage Equality

The U.S. Supreme Court's *Windsor* decision in 2013 spurred a federal Judge in Texas to rule that the Texas ban on same-sex marriage violated the U.S. Constitution[1]. Enforcement of the Judge's decision was put on hold pending appeal. During that appeal, another case made its way to the U.S. Supreme Court: *Obergefell v. Hodges.*

In *Obergefell*, the Supreme Court ruled that marriage between two people is protected by the U.S. Constitution's guarantee of due process and equal protection. Marriage is a liberty that has been protected by the U.S. Constitution and prior U.S. Supreme Court decisions. Same-sex couples are accorded the same right to marry as opposite-sex couples. Further, the U.S. Constitution does not allow a State to refuse to

[1] DeLeon et al v. Perry, Case SA13-CA-00982-OLG in the U.S. District Court for the Western District of Texas, San Antonio Division; order issued on February 26, 2014.

recognize a lawful marriage performed in another state because the marriage is same-sex.

The Texas Governor and Texas Attorney General issued statements expressing concern about the *Obergefell* decision. Much of their focus was on religious liberty for individuals. But, a government employee, even when basing their refusal on a sincerely held religious belief, cannot refuse to issue a marriage license to a same-sex couple. Federal law and the courts stand behind the *Obergefell* decision.

Same-sex spouses now have tax equity, Social Security equity, Civil Service equity, Medicaid equity and military benefit equity. Procedures to honor these rights are still, in many instances, under development.

Same-Sex Divorce

The Supreme Court of Texas has also heard cases on the issue of divorce for same-sex couples who legally married elsewhere and later moved to Texas. Two different couples who married legally in other States and moved to Texas were having marital issues and filed for divorce in Texas. The Texas Attorney General intervened, claiming Texas did not recognize same-sex marriages and that to grant a divorce the State must first recognize the marriage, which Texas law prohibited.

The *Naylor* case[2] was argued before the Supreme Court of Texas in late-2013 and the Court, just prior to the *Obergefell* decision was handed down in 2015 decided that the State had no right to intervene.

Obergefell made the state's argument moot. Marriage is marriage, whether between opposite-sex or same-sex individuals. They have the right to remain happily married, and have the legal right to divorce when the marriage fails.

Common Law Marriage

Marriage is a distinct legal state that provides a variety of rights and benefits to the married couple. If you claim that you are married to someone, you must have proof. Generally, your marriage license serves as that proof. But, if you did not go through the formal process of obtaining a marriage license and having a wedding, then the public does not know the legal status of your relationship and you need to take other steps to formalize your informal marriage.

In Texas, common law marriage is called "Informal Marriage". What proof is needed to create an informal marriage? In Texas, you must establish that you both have agreed to be married, have lived together in Texas as husband and wife, and have told other people that

---

[2] State v. Naylor, 466 S.W.3d 783, 58 Tex.Sup.Ct.J. 1216 (Tex. 2015)

you are married. No specific amount of time needs to pass to create an informal marriage. Both spouses must be 18 or older. The marriage begins the first day that all these legal conditions are met.

You can also use written proof. You may file a "Declaration of Informal Marriage" with the county clerk. They have the form and provide it to you. It must be signed and must be sworn to by both the husband and the wife.

Does a couple who are informally married have to get divorced if they break up their informal marriage? Technically, the answer is "no". However, if one "spouse" wants to make the type of claims typically made in a divorce, then Texas law says they have two years from the date of separation to prove the marriage existed. It is legal to wait beyond two years, but then there is a presumption that the couple was not married – hence, any divorce would be more difficult.

The Supreme Court of Texas has ruled that trial courts should be careful about implied agreements to be married. They want a fairly obvious and mutual agreement. It may not be enough to show that just one of the couple said the marriage existed. The court will also look to the spouses' actions to back up their words. For instance, if the "husband" pays the "wife's" medical bills or takes on some other obligation that only married couples usually assume, that act supports an implied agreement to be married.

Technicalities aside, if you have been in an informal marriage that has ended, you should strongly consider

going through a formal divorce to finalize any lingering legal issues and avoid possible future problems.

Marital Property

When an individual is unmarried, that individual typically has sole ownership of all their assets. For a married couple, assets can take on subtler definitions. People need to understand the impact marriage may have on their property rights.

Community Property and Separate Property

In community property States, almost all assets you acquire during marriage are community property. Almost all income you receive during marriage is community property. In addition, an asset is presumed to be community property unless there are "clear and convincing" facts which legally show it is separate property.

Texas and Washington are two of nine States that use the community property system. Other community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Wisconsin. Alaska is an elective community property State; Alaska residents can choose to manage marital finances as community property. In addition, the U.S. Territories of Puerto Rico and Guam are community property jurisdictions. Each of those States and Territories has local variations; the systems are not identical. The rest

of the States are called “common law” States, where the property system is descended from the British system of separate ownership.

Common law States use a system of separate property for married couples that is distinctly different from community property States.

- Any items owned before marriage are separate property and remain separate;
- Any items acquired after marriage through gift or inheritance are separate property;
- Any recovery awarded for a personal injury is separate property (except money to replace lost income that would have been community property); and,
- Spouses may agree that certain items are separate property via a binding properly written and signed contract (a Prenuptial Agreement or a post-nuptial Marital Partition Agreement).

One feature of community property is far from obvious: any interest earned on separate property is, by definition, community property unless the spouses agree in writing that it will be separate.

Growth of the intrinsic value of a separate asset usually remains separate property. Capital gains must be distinguished from income produced by a separate asset. For example:

> You have some shares of stock you owned before you married. An increase in the value of the stock is intimately part of the stock, and that growth remains separate property under most circumstances. If the stock was worth $10 per share before you married and is now worth $12 per share, the $2 increase remains separate property.

There is an exception to this capital gains rule. If the separate property's value goes up because of the personal efforts of its owner, the increase is community property. For example:

> If you own a separate property house, an increase in its value could be either community or separate property depending on the cause of the growth. If the value goes up simply because the market is good, then the increase is separate property. But, if the value goes up because of the owner's personal efforts (like repairs or improvements) then the value increase is community property.

One other category of property exists: an "equitable interest" in the separate estate of the other spouse, or in the community estate. This was devised by the legislature primarily as a method to divide values in a divorce. For example:

> David is unmarried and buys a house with a mortgage. Later, he marries Katie. They both work, and she pays half the mortgage payments for five years. Then they get divorced. The house is still David's separate property, but Katie has an "equitable interest" roughly equal to the contributions she made to the mortgage. She can be compensated for the contribution.

What if David and Katie enter into a Premarital Agreement so they will not have community property, but Katie still makes payments on David's house? Now, her "separate estate" has an equitable interest in the house, and she can be compensated if they divorce. The house remains David's separate property, and the divorce ends Katie's homestead rights.

Conversion to Community Property

Spouses can choose to convert separate property into community property[3]. This has only been true in Texas since January 1, 2000 – before that date, there was no legal way to switch separate property into community property, except through "sloppy bookkeeping" that forced the presumption that an "unidentified" asset is a community asset.

The agreement to convert separate property into community property must be written, must be signed by both spouses, and must identify the property that is being converted. It does not need to have other "consideration" – that is, no "swap for value" is needed to make the conversion legal. Finally, the agreement must specifically point out that it is a conversion. Without a specific reference to the conversion, the law

[3] Texas Constitution, Article 16, §15 and Texas Family Code section 4.202.

will presume that any transfer creates separate property of the receiver.

One more point: both spouses must be aware of the legal effect of the conversion. Texas law provides a disclosure statement, and when it is included both spouses are presumed to understand the legal effect of the agreement.

Washington State[4] permits a married couple to convert separate property into community property upon the death of one of the spouses. Unlike Texas community property agreements, a Washington agreement as to status does not come into play in a divorce. In effect, the Washington agreement replaces a Last Will and Testament for the deceased spouse. Because of this, the agreement must be executed in a similar fashion to a Will.

‖ *Presumed Community Conversion?*

Community property States presume that any asset held by either spouse is community property, unless clear evidence establishes that it actually belongs to only one spouse as separate property. Can one spouse unintentionally "stumble" into converting his separate property into community property? For example:

---

[4] Revised Code of Washington Section 26.16.120.

> Husband's mother dies, leaving him $300,000. He invests the money in several CDs, in both his name and his wife's name. Are the funds his separate property, or has he converted them into community property? The legalities in a situation like this can be difficult to unravel. It is clear that when he received this inheritance, it was legally his separate property. If he had invested the funds in his name only, there would be no question that it remained his separate property (except for the new interest earned, which is community property). However, he would have to prove that the funds in this joint account were traceable to his inheritance to overcome the presumption that the funds are community property.

There are two possible legal consequences of putting the money into the joint account with both names: 1) adding the wife's name made her an owner, or 2) adding her name was simply a convenience and did not change the ownership at all.

The Texas Estates Code contains several provisions that deal with joint accounts. One of them states that a "joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each… unless there is clear and convincing evidence of a different intent". Under this provision, it would be the wife's burden to prove that the husband affirmatively intended to give half the money to her.

The Texas Court of Appeals, in its decision in "In the Matter of Case[5]," looked at a very similar situation. It decided that the provisions of the Probate Code (now the Estates Code) apply. The funds belong to the husband as separate property unless the wife can prove that he intended to make a gift. His intentions legally control the outcome.

Managing Community Property in Texas

Texas property law has some management features that are unique to that State. Texas community property falls into two management divisions:

- "Joint management" community property exists whenever assets are commingled into a joint account or titled in both names. Both spouses have equal rights to control or to spend the assets.

- "Sole management" community property exists when an asset is maintained in one spouse's name alone. That spouse then has the sole right to control or to spend the asset.

A paycheck, for instance, payable only to one spouse and deposited into a bank account in that spouse's name only, is that spouse's sole management community

[5] 28 S.W.3d 154, In Matter of Case (Tex. App. - Texarkana) 2000.

property. Even though both spouses own it equally, they do not have equal management rights.

If you have a sole management asset, your spouse has no control over it. However, if you get divorced, or when you die, your spouse will obtain control over their share. You can dispose of your share in your Will to anyone you desire.

Under the Texas Family Code, your share of any community property is not subject to a liability that arises from an act of your spouse, except under a few circumstances. One such circumstance is if your spouse incurred the debt while acting as your Agent. Another circumstance is if your spouse incurred debts for “necessaries” like food and shelter.

In addition, sole management community property held by one spouse is not liable for the contractual liabilities of the other spouse (like credit cards) so long as the holder is not a party to the contract. However, if the other spouse commits a tort (like causing an injury in a car accident) then all the community property of both spouses, whether joint management or sole management, is subject to the liability.

MARTIAL AGREEMENTS

A martial agreement is a written agreement between you and your spouse drafted to seek mutual understanding of the legal questions that will affect your marriage. The discussion may strengthen your relationship with your

prospective or current spouse, and may reveal fundamental differences in character and future plans.

If you both feel that marriage remains a good choice, your next step is to see a qualified Attorney about a premarital/prenuptial agreement. You may be tempted to settle upon a loving, trusting verbal understanding. Understand that if you do so, it is non-binding and will not stand up under pressure. The only way to establish a legally binding agreement between you and your spouse is with a written properly executed agreement.

Your agreement might include the practical issues such as:

- Where will you live?
- Who will pay living expenses?
- What debts exist and who will pay them?
- When you take a vacation, will you pay or will expenses be split?
- Will you pay for the other's nursing home bill if that day arrives?

The discussion should also introduce several legal issues, including:

- How will you divide your assets?
- Will you allow a community property estate to be created?
- Will investment income be community or separate property?
- Is your fiancé's estate taxable? Is yours?
- Will your spouse pay your taxes?

- Will you pay your spouse's debts?
- What will happen if and when the marriage ends?
- Will you and your spouse share a spousal "duty of support"?

You can agree to do away with the confusing rules regarding income and growth of capital assets. With a properly written & signed document crafted by your skilled attorney, you are legally allowed to set up your own system of legal ownership, even though it is completely different from regular State law.

Once you have determined that certain assets belong to you – and are neither affected nor changed due to the new marriage – then you can choose how to manage and how to dispose of the assets. You can declare in your Will or in a Living Trust who will be your heirs. Estate administration is simplified because your assets are clearly identified in the premarital agreement and your heirs are clearly identified in your Will or your Trust.

With people living longer, it is becoming more prevalent that after remarriage one spouse may need long term care, assisted living, or nursing home care. Note that a premarital agreement does not hide the healthy spouse's assets from Medicaid (read more about this in the Medicaid for Long-Term Care section of this book).

Post-Martial Partition Agreements

If you did not make a premarital agreement, the door is not closed. Even a couple who have been married for years can create a contract to guide the future of their

relationship and define the future use of their property. In Texas, the legal tool used to convert community property into separate property and create a contract to guide the future of their relationship is called a "Partition Agreement." Elsewhere it may be known as an "Agreement as to Status", or a "Postnuptial" or "Antenuptial" agreement. Speak with a local attorney to determine your options under your state's laws.

The Texas Family Code allows you and your spouse, in a written Partition Agreement signed by both of you, to convert some (or all) of your community property into separate property. You may record the Partition Agreement with your county clerk; a practice strongly encouraged by the Authors. Although it does make your wishes "public" it also covers the issue of one spouse destroying or losing the document when they want to have the scales tip their direction.

The partition process may be done by the two of you at any time during your marriage. It can include property that is currently community and property that might become community in the future.

The Partition Agreement is not valid if it is done to "defraud" a preexisting creditor of one of the spouses. Also, one of the spouses may later challenge the validity of the agreement by proving that:

- The agreement was not signed voluntarily, or,
- The agreement was "unconscionable" when it was signed and that before signing, the challenger did not know and was not provided with a fair and

reasonable disclosure of the assets and the debts of the other spouse.

You should hire a qualified Attorney to write the Partition Agreement and to review your Wills to be sure they conform to your desired ownership pattern.

Second Marriages and beyond…

When a senior considers marriage, quite often it is really "re-marriage". Multiple marriages raise many concerns. Unlike youngsters starting out in life, seniors have commitments to honor; perhaps children, perhaps significant savings, and certainly treasured memories.

Although the love and companionship that can be found in a second marriage is of immeasurable value, so is devotion to your first family. If you are going to go into a second marriage, go into it with your eyes open, aware that you are empowered to address the issues and find solutions before remarrying.

Discussing financial issues may be perceived by your fiancé as offensive. If they react this way, get on with it now. Certainly it is better to find out you have different attitudes toward money and family before you are legally married. They may feel the same worries as you. If you are going to be married, you will want to find positive ways to discuss important issues. The discussion is not one of the more romantic components of your relationship, but it is vital.

DIVORCE

... and Your Will

Divorce alters your Last Will and Testament.[6] The law does not revoke your Will; it does, however, modify your Will for you. It makes an assumption, which in most cases may be very logical, that if you are divorced then you no longer want to leave any assets to your former spouse.

Washington law states that “provisions in the Will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the Will expressly provides otherwise.” Your former spouse cannot legally inherit or be Executor under the Will you made while still married, unless your Will specifically allows it. Instead, your estate passes as though your previous spouse had died before you, and your alternate Executor becomes primary.

In Texas, the legislature also makes a second assumption for you. Texas law states that “each relative of the former spouse who is not a relative of the testator” is also treated as though they had died before you. Thus, your ex-spouse’s children (from a prior marriage) and

---

[6] Texas Estates Code, Section 123.001; Revised Code of Washington Section 11.12.051.

their children cannot legally inherit under the terms of the Will you made while still married unless your Will specifically allows it.

It is very possible a partial intestacy could be created – that is, that a gap could be left in your Will. For example:

> The law says your ex-spouse must be treated as if they predeceased you. If your Will says, "If my husband predeceases me, I give ½ my estate to his children and ½ my estate to my children," the law says his children must be treated as if they were deceased.

Does your Will say what happens if his children are deceased? If not, the now-undesignated part of your estate triggers a complex probate proceeding called a "Determination of Heirship".

If you are divorced or if you are in a divorce proceeding, it is vitally important for you to make a new Will as soon as possible. Your new Will can cure all of the deficiencies created by the legislature. In your new Will, you can leave your assets to anyone you wish. You may decide to leave it all just to your children, and if they predecease you then to your grandchildren. Or you may legally decide to re-instate the terms of your prior Will by leaving assets to your ex-spouse. So long as your wishes are in a Will you signed after the date of the divorce decree, your specific wishes again rule (although you would be rare indeed if you decide to re-instate your ex-spouse's right to inherit).

Please note that these changes to your Will only occur with a divorce decree. The decree is the end point of a divorce; before the decree is signed by the Judge the couple is still married. There may be months of legal wrangling before the decree is signed. During those months – though the relationship between spouses is at a low point – they still can inherit from each other UNLESS action is taken to remove the spouse from that favored position. It is vital that as soon as a petition for divorce is filed, both parties see their Certified Elder Law Attorney to change their Wills.

Do not let the legislature's assumptions rule. If you are in a divorce proceeding, make your own wishes known and legally binding by signing a new Will as soon as possible.

... and Your Living Trust

Until recently, Texas State law did not address what happens to the assets inside a Living Trust when the spouses who set it up divorce. Now, the Texas Estates Code[7] states that divorce or annulment of a marriage voids any provision in a Living Trust that provided benefits to the former spouse. Those funds are treated as though the former spouse disclaimed their benefit, meaning that items will pass as though the former

[7] Texas Estates Code section 123.052

spouse had already died. Also, any appointment of the former spouse as Trustee is voided by the divorce.

... *and Your Power of Attorney*

Divorce also affects your Durable Power of Attorney and your Medical Power of Attorney. Texas law voids any powers given to your ex-spouse the moment a divorce decree is signed. Washington law, as of January 1, 2016, voids any powers the moment the petition to dissolve the marriage is filed. If you are getting divorced, you should proactively change your Financial and Medical Powers of Attorney no later than the moment you file for divorce. Do not wait for the decree to be issued, or your spouse can still use the Durable Power of Attorney to wipe out your finances. (Of course, with the fiduciary duties now owed by an Agent to a Principal being open to enforcement in criminal court, your spouse would be sadly mistaken to abuse their fiduciary duty).

... *and an Incapacitated Spouse*

Divorce signals not only the end of marriage; it is also the end of the financial partnership. The real problem when one spouse is incapacitated is whether they can adequately defend their property interests. This is particularly difficult when one of the spouses is incapacitated or under a Guardianship.

Even people with mental impairment can divorce under "no-fault divorce" law. It is enough for one spouse to claim that discord or conflict of personalities has

destroyed the legitimate ends of the marriage and that there is no reasonable expectation of reconciliation.

If a Guardian has been appointed, the Guardian can protect the ward's interests. In the case of *Stubbs v. Ortega*[8], heard in the Court of Appeals in Fort Worth, the wife had Alzheimer's disease and was under Guardianship. Her husband was abusive, so her Guardian sued him for divorce. The husband claimed it was against public policy to allow an incapacitated person to get divorced. The court decided that although it has been public policy to "foster and protect marriage and discourage divorce", this does not bar an incapacitated person from obtaining a divorce.

Under state law, a person with mental illness has all the rights, benefits, responsibilities, and privileges guaranteed under the law, including domestic rights. The *Stubbs* Court allowed the wife's Guardian to petition for divorce on her behalf, and it was granted.

---

[8] Stubbs v. Ortega, 977 S.W.2d 718 ((Tex.App. 1998).

Grandparent's Rights

When a child divorces their spouse, grandparents and grandchildren may be innocently caught in the crossfire. Grandparents have legal rights to their grandchildren, but they are strictly limited. The U.S. Supreme Court, in its 2000 decision *Troxel v. Granville*[9] said, "…the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court".

Troxel means that the courts will not interfere with the parent-child relationship lightly, not even for the sake of a grandparent.

Grandparent's Rights in Texas

The Texas Court of Appeals ruled in 2003 that the Texas grandparent rights statute is Constitutional only if interpreted in a way that is consistent with *Troxel*[10]. A parent's rights can only be interfered with when there is a compelling reason. The only acceptable compelling reasons are 1) if the parent fails to care adequately for the child, or 2) if denying access to the grandparent

[9]Troxel v. Granville, 530 U.S. 57 (2000)

[10] 126 SW3 251, In re Pensom

would significantly impair the grandchild's physical health or emotional well-being. The burden of proof is on the grandparent.

Another Texas grandparents' rights case, *In re Keller*[11], dealt with a grandfather who wanted visitation of his 21-month-old granddaughter. His son, the granddaughter's father, had died and her mother refused visitation. Though the trial court granted visitation, the appeals court reversed that decision, holding that to "protect parents' fundamental rights under the Due Process Clause," the courts must "presume that a fit parent acts in the best interest of his or her child". The burden of proof is on the grandparent to overcome that presumption as well.

As a consequence of the *Pensom* and *Keller* decisions, the Texas legislature updated the Texas Family Code in late 2005. Grandparent rights were expanded by allowing not only access to the grandchild, but also "possession" of the grandchild (which means the grandchild would live with the grandparent, not just visit). Grandparent rights were limited by requiring the grandparent to prove that "denial of possession of or

---

[11] In re Keller, 2005 Tex. App (LWC-6924), No. 04-05-00542-CV

access to the child would significantly impair the child's physical health or emotional well-being"[12].

Washington law has been similarly updated. The Washington Domestic Relations Code[13] presumes that the relationship between a grandparent and their grandchild is in the child's best interests. The parent seeking to prevent visitation must overcome this presumption with evidence that visitation would harm the child.

A grandparent can intervene and make a request for access or possession in a lawsuit originated for that purpose, may intervene in an existing divorce matter, or may request modification of a divorce that was already concluded. Seeking assistance from an attorney with extensive family law background is wise. Discuss legal fees and court costs up-front to avoid surprises with your divorce attorney.

To bring an action, your child must be the "biological or adoptive parent" of your grandchild. If you are a step-grandparent, the Court cannot help you unless your child officially adopted the grandchildren.

---

[12] Texas Family Code, §153.433

[13] Revised Code of Washington, 26.09.255(5)(a) et. Seq.

Protecting Your Estate With an LLC

What can you do to protect your assets from potential lawsuit liability? One strategy is to compartmentalize. Already, you own certain items that are safe even from a court judgement against you, like your homestead and your retirement accounts. But your regular savings, your non-homestead real estate, and all of your non-retirement investments could be lost in a lawsuit. Compartmentalize by separating the exposed assets from your mineral rights using a Limited Liability Company (LLC).

An LLC is a hybrid form of business entity. Unlike a regular corporation, which must have shareholders, a board of directors and officers, an LLC operates more like a partnership. For tax purposes, the LLC can be a pass-through entity. For management purposes, it can be operated by one person, by a married couple, or by a small group (like several siblings). For liability purposes, the LLC itself may bear liability for damages caused by its operations, but the owners' other assets (outside the LLC) are safe.

Using the LLC business format brings a variety of benefits. An LLC creates a structure by which you will conduct business. Who has an ownership share? How do you make a decision about buying new properties? Who controls the business if someone becomes disabled? What happens to an ownership interest upon death? How do you handle the books to cover maintenance, taxes, insurance and expenses for the

properties? How do you divide the income produced by the properties, and how do you divide the funds if a property is sold? What are your tax liabilities? The LLC's operating agreement will answer all of those questions and more.

The LLC format also separates your other assets from the property owned by the LLC. Your monetary investments, like your savings, CDs and stocks remain your personal assets (even though the investments may be owned by your Trust). Your real property investments, when held by one or more LLCs, are segregated into separate legal entities (even though the entities may be owned by your Trust).

If there is an unfortunate injury at one of your properties, the LLC's separation means that your personal investments will not bear liability. Only the assets owned by the LLC itself will be subject to any claims. You will be protecting your personal assets by segregating them from your real property assets. You can even segregate one rent house from liabilities generated at a different rent house by creating multiple LLCs, one to own each rent house.

To simplify distribution of ownership upon your death, you should consider allowing the LLCs to be owned by a revocable Living Trust. You would be the Trust's grantor and its lifetime beneficiary. If you become disabled, your selected successor Trustee would continue to manage the Trust and its assets (which includes managing the LLC and therefore the real properties). When you die, the Trust management can

be handed to the same person you would have selected as Executor in your Wills. That Trustee/manager will be able to sell the properties, terminate the LLCs and distribute the proceeds to your heirs – all without having to go through probate.

PART 2: Estate Planning for Non-Traditional Relationships

Your Right to Self-Determination

Legal planning is all about self-determination. Americans, both young and old, are increasingly choosing non-traditional ways to exercise their right to pick their own lifestyle and to form relationships, both romantic and non-romantic, with their loved ones. The choice, however, requires that participants in non-traditional relationships take additional steps to enjoy the legal rights and responsibilities granted to people who live within traditional boundaries. Every non-traditional relationship will eventually face legal challenges that can be overcome with the proper forethought and planning. You should engage in legal planning while everything is going smoothly in your relationships, then you will already have everything in place when circumstances change.

The term "non-traditional relationships" covers (inadequately but necessarily) the broad scope of relationship styles that do not conform to the traditional societal concept of two individuals in a closed marriage. This includes open relationships, polyamory, non-

marital relationships like life partners, and non-romantic relationships like a Boston Marriage or the loving and supportive relationship formed between a martial arts sensei and their top pupil.

The legal concepts outlined here apply equally if you are a married adult polyamorist, a young adult with a dedicated but unlabeled partner, or a mature divorcee or widow who wants to build a life with a new partner without the complications of marriage (such as concerns about taxation, eligibility for Medicare and Medicaid, and the end of life issues with mixed adult families).

Note that since the *Obergefell* decision in the U.S. Supreme Court, marriage between two individuals of the same sex has the legal status of a traditional relationship. This part is not meant to cover same-sex marriages, but may apply to unmarried same-sex non-traditional partnerships. same-sex couples or groupings who are unmarried.

This discussion is not intended to provide relationship guidance. Legal planning can only help you to formalize the devoted relationships you have already formed with your partner or partners. We will primarily cover how estate planning concepts apply to non-traditional relationships and will only briefly discuss the details of the estate planning tools themselves. For more information on those tools and techniques refer to the other parts of this book.

People in non-traditional relationships may require malleability that is lacking in more traditional

relationship structures. All of the legal planning tools discussed here are easily amended and revoked in the event that your circumstances change, in stark contrast to the dissolution of a formal marriage. Legal planning is a powerful solution and tool for people who choose to walk the paths of life that are less commonly trod.

Taxes & Benefits

It is important to recognize that various state laws and federal laws – like the Internal Revenue Code or the Social Security Act – do not recognize non-traditional relationships in the same manner as marriage.

People in non-traditional relationships do not get to take advantage of benefits like:

- The unlimited marital deduction for the Estate Tax;
- Qualified Terminable Interest Trusts;
- Medicaid Spousal Allowances;
- Social Security Survivorship benefits;
- Legal homestead occupancy rights;
- Being default choice for Guardian;
- Being Default Surrogate for Medical Decisions;
- Receiving pension survivorship benefits;
- The right to judicial assistance with the dissolution of your relationship (divorce);
- Favorable tax treatment when named as IRA beneficiary; and

- Many other rights accorded only to traditional relationships.

Some of these denials are insurmountable. But many can be overcome with proper advance legal planning.

Relationship Agreements

You are likely familiar with the idea of a Relationship Agreement. You have probably come across the idea in the form of a Nuptial Agreement, an agreement between a married couple used to define the terms of their relationship and the ownership and use of assets. A Nuptial Agreement may be called a Prenuptial Agreement if it is created before the couple is legally wed, or a Post-Nuptial Agreement if it is created after the wedding. For more information on nuptial agreements, read the Marital Agreement section. When no marriage is involved but the partners live together, many of the same elements can be drafted into a Cohabitation Agreement.

A Relationship Agreement is a contract between you and your partner(s) to define the way you intend to live your lives together. It is highly personal and flexible and may contain, but is certainly not limited to, provisions such as:

- The division of property acquired during the cohabitation;
- The separation of debts and liabilities;

- The right to use a home or other piece of real or personal property;
- Obligations to pay expenses such as rent or mortgage, utilities, and insurance;
- Income, and maintaining its character as belonging to one of the cohabitants;
- You and your partner's intention whether or not to be married, and that there is no intent to be married unless a marriage license is obtained;
- Mediation and dispute resolution clauses in the event that you and your partners are unable to work out a dispute on your own; and,
- What should happen at the end of the relationship.

When considering your Relationship Agreement, consider all of the elements of how you want your relationship with your partners to function. The initial discussion will provide an opportunity for you and your partner to determine what you want from the relationship. Rest assured, the agreement can be modified or terminated to account for changing circumstances as your relationship(s) grow and develop.

A well drafted Relationship Agreement may also assist you in preventing a court from deciding that you and your partner formed a meretricious relationship or common law marriage. Those would require judicial

intervention to be dissolved and judicial intervention to distribute property. Your Relationship Agreement can avoid these court battles.

Cohabitation Agreements

People are living longer and sometimes, as circumstances change, old friendships change into romantic and supportive relationships. Getting old does not mean that romance or the need for companionship and intimacy stops. There was a time, however, when those benefits were available only in marriage. Today, remaining unmarried no longer carries a negative stigma, and in fact may be the smartest way to handle family and finances.

When two adults form a close relationship and cohabitate, various legal issues arise. A written Cohabitation Agreement between the parties is necessary, and should be prepared by legal counsel to cover many different angles. Both parties should have ample opportunity for the Agreement to be reviewed by separate legal counsel before it is signed. Ideally the Agreement should be completed before you begin to cohabitate, or as soon as possible thereafter.

The Cohabitation Agreement should cover a wide variety of topics. For instance:

- You should agree that the relationship is that of landlord-tenant and of intimate friends. You should agree that neither of you will hold out to the community that you are married or that you intend to marry. In this way, you avoid creating a

legally binding "informal marriage" under the Texas Family Code or "committed intimate relationship" under Washington Law.

- You should agree that you can both make estate-planning arrangements without involvement or knowledge of the other. Also, agree to accept the terms of any estate-planning arrangement made by the other, and to waive any claims against each other's assets.
- You should agree whether any rent will be paid to the party who owns the house. If no rent will be paid, will there be other tasks expected in exchange for lodging (like cooking and cleaning, or lawn maintenance)? The agreement should clarify the circumstances under which the cohabitation will end. For instance, what if the homeowner has to move to a nursing home? Would the tenant be allowed to stay, or must the tenant move out of the house?
- The Agreement should cover the commingling of your personal items and furnishings. Each of you may place favorite furnishings in the house, and you might even buy some new furniture together. If one of you dies, the agreement should dictate how those items will be handled. You do not want the adult children of the other party to descend on your home and paw through your personal effects. Creating a list or even a photo-log of items can help avoid conflicts.
- Once the Agreement is in place, what will be done with a house that has been vacated (one party will leave their home to begin the

cohabitation)? The Agreement should confirm that the house belongs solely to the person who owned it before the cohabitation. If the house will become a rental property, the owner should consider setting up an LLC (Limited Liability Company) to protect all of the other assets from a mishap.

Your Partner as Your Agent

Married couples routinely make many decisions for each other. The state and federal legal system facilitates deep interdependency in a married couple's financial and medical affairs. Married couples regularly create deeply interlocked and interdependent financial lives. They open joint bank accounts, purchase property together, file taxes jointly, and have the right to collect government benefits on behalf of their spouse. In community property states, married couples by default have rights in community property and regularly intermingle separate property beyond the ability to differentiate it.

In addition to profoundly joined financial affairs, the legal system favors married spouses when one of them becomes disabled and requires assistance with their medical affairs. Unless a married person has taken affirmative steps to override the law, their spouse, as their next-of-kin, has the authority under state Default Surrogacy Laws to make health care decisions on their behalf when they are no longer competent or become incapacitated. As their next-of-kin, a person's

spouse also has the right to consent to after-death examinations and procedures and is the default person to make burial and other final arrangements.

Modern non-traditional relationships are largely overlooked by default state and federal decision-making regimes. Instead, people in non-traditional relationships need to take advantage of their right to delegate to their partners the legal authority to act on their behalf. This sort of delegation of authority is called agency, and the person to whom you grant authority is called your Agent. Agency is widespread throughout the estate planning ecosystem. Anyone in a non-traditional relationship should understand its uses so they will have power to take care of their partners and be taken care of in turn.

A document called a POWER OF ATTORNEY allows you to grant another authority to act on your behalf. Powers of Attorney comes in two broad types, financial and medical.

A Financial Power of Attorney can be as narrow as the specific authority to handle the sale of a particular asset, or as broad as the authority to manage all of your financial affairs. A Financial Power of Attorney is extremely useful for people in non-traditional relationships because it allows them to grant a partner the authority to manage their personal and real property, pay their bills, handle their other obligations.

A person with multiple partners can also use a Financial Power of Attorney to divide responsibilities between their partners. For instance, you could grant one partner

rights to manage the shared home and another partner rights to manage investments and retirement accounts.

A MEDICAL POWER OF ATTORNEY takes advantage of state law to grant another authority to make medical decisions on your behalf when you become incapacitated. Without a Medical Power of Attorney, your doctor will first look toward state mandated Default Surrogate (for someone unmarried, typically a court-appointed Guardian, or their parents, siblings or other next of kin) to provide informed consent for a medical procedure.

For many, their default surrogate is the same person as the individual who they would want to make decisions on their behalf. For many others, the thought that their mother or estranged sibling could consent to a medical procedure for them is distasteful if not totally terrifying. A Medical Power of Attorney allows you to select the person who you trust to have your best interests at heart and make medical decisions in accord with your wishes.

Another significant benefit of Medical Powers of Attorney is the ability to take advantage of the HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) to simultaneously grant another the right to access your health care records and the right to be in your presence at the hospital. You can use HIPAA to allow your partner(s) and loved ones to stay close to you at the hospital.

After you pass away, a loved one or friend will generally step up to handle the final disposition of your remains as well as any funeral arrangements. However, you can

if you choose declare an Agent to handle these affairs and let your wishes be known in your LAST WILL AND TESTAMENT or in a Disposition Authorization and DESIGNATION OF AGENT FOR FUNERAL ARRANGEMENTS. By doing so, you can circumvent potential complications between partners, friends, and family who disagree about religious traditions and funerary practices and the proper disposition of your final remains.

CO-OWNERSHIP OF PROPERTY

People in non-traditional relationships are often concerned about property co-ownership during and after the relationship. Naturally, as you live with your partner, you foster financial and personal interdependency. It is common for people in dedicated non-traditional relationships to want to purchase a car or a home together, not only for the financial benefits of co-habitation but also for the deep emotional connection that comes from building something together while sharing your personal living space with your partner. Additionally, property co-ownership can allow for wealth accumulation over time to provide a solid foundation to future generations, such as in the case of a line family. Property may be owned simultaneously by more than one person either through personal co-ownership or entity co-ownership.

Personal co-ownership, or co-ownership of the property itself, is relatively straightforward to create with the proper paperwork, but it does not place any limitations

on the co-owners. Each owner may individually sell their interest without the knowledge or consent of the other co-owners. Tenancy in Common and JOINT TENANCY both provide the co-owners with an undivided interest in the whole property. If you own a house with your partners as either Tenants in Common or Joint Tenants, you each have the legal right to occupy and use the entire property. Joint Tenancy is unique in that in many states (Texas excepted) it also creates something called a RIGHT OF SURVIVORSHIP, and because of this it requires some additional effort when transferring or purchasing property. A Right of Survivorship means that when one co-owner dies, their ownership interest is automatically distributed among the remaining co-owners thus avoiding the need for probate. It also avoids the surviving partners inadvertently becoming co-owners with one of their former partner's parents, siblings, or children. A Joint Tenancy with Right of Survivorship can be created in any sort of property, including bank accounts and retirement accounts. However, one of the most common uses is in real property.

For example, a husband and wife are two members of a triad along with their female life partner. The three of them decide to purchase a home together and all of them sign the deed. They are automatically Tenants in Common. A year later, the life partner passes away without a Will leaving behind an elderly mother as her only blood kin. The laws of intestate succession, which we will discuss again later, mean that her mother inherits her interest in the home and suddenly the husband and wife find themselves co-owning their

home with someone with whom they may have never intended to co-own property. The elderly mother now has the right to occupy the premises, and can convey her interest in the property however she deems fit. If the triad had taken the extra step to hire an attorney to draft the deed as a Joint Tenancy with Right of Survivorship, after the death of the life partner the husband and wife would have found themselves each owning one-half of the house rather than one-third. The mother would have been excluded.

A Joint Tenancy with Right of Survivorship is easily severed. A Joint Tenancy can be converted into a Tenancy in Common if any of the original co-owners convey their ownership interest to a third party and the other co-owners have no right to stop the person from selling. The way to avoid this is by using an entity to own the property, and then sharing co-ownership of the entity itself. An entity could be a TRUST, a LIMITED LIABILITY COMPANY, a Cooperative, or a Corporation, depending on your particular needs and circumstances. Each has its own benefits and drawbacks, and each is designed to serve a particular purpose. However, a common characteristic is that you and your partners can work with an attorney to draft the controlling documents (the Trust Agreement, the LLC Operating Agreement, the Cooperative Agreement, or the Bylaws, respectively), which control the management and possession of the property and can prevent any one individual from disrupting the overall co-ownership plan.

We have already discussed legal planning necessary to direct what happens to your remains after you die, and what sort of funeral you want to have. We have not discussed the matter of what happens to your real and personal property, collectively your “estate”. Naturally, you want your estate to pass for the benefit of your loved ones, or if they are already well supported, you may want your estate to go to a charity or organization whose mission you sustained during your lifetime. People in non-traditional relationships face a unique challenge in that the laws of INTESTATE SUCCESSION severely favor married spouses and blood relations.

Intestate succession is the default legal system when an individual has died without a leaving a proper, enforceable legal document to direct the disposition of their estate. When you die, first the state will look toward your spouse or domestic partner. If you do not have one, then they will give your property to your issue (your children). If you are not survived by any children, then the state will look toward your parents, then your siblings, then your grandparents, and finally to your aunts and uncles. If you die unmarried, without a Will and without any blood relations or other heirs, your estate will escheat to the state.

Understandably, intestate succession is distasteful to most people, whether they are in a traditional or non-traditional relationship. However, the impacts of intestate succession can be particularly stark on individuals who choose to form non-traditional

relationship bonds, especially if those choices serve to drive a wedge between the person and their biological family. Thankfully, as non-traditional relationships are becoming more common and more accepted, people do not need to give up their relationship with their parents and siblings in order to live the life they want to live, but this is still an important factor to consider.

There are two ways to avoid intestate succession. You can leave instructions for what to do with your estate after you die using a Last Will and Testament. Or you can make non-testamentary arrangements for all your assets, with a Living Trust, Rights of Survivorship, or other beneficiary arrangements.

A Last Will and Testament is a carefully drafted and executed set of directions in which, among other things: you name someone to administer your estate after you die (your Executor), you direct how you want your assets to be disposed of and name your heir(s), and you nominate a Guardian for your children if necessary. After you die, your Will must typically go through probate, a public process that requires your Executor to hire an attorney. Probate is not an onerous process, but if you can avoid it through pre-planning using non-testamentary disposition of your property, then you can minimize stress on your grieving loved ones while maintaining privacy to the greatest extent possible.

Rights of Survivorship are a common non-testamentary arrangement, which we discussed earlier as a tool for the co-ownership of property. Rights of Survivorship deal with the disposition of assets without the need for

a Last Will and Testament; when you die your ownership interest is automatically distributed between the remaining Joint Tenants.

Another form of common non-testamentary arrangement is a LIVING TRUST.

You create a Living Trust to manage your assets during your lifetime and to help your loved ones after you die. A Living Trust is created by a Grantor, who provides assets to the Trust. A Trustee then manages the Trust for the benefit of a named Beneficiary. Generally, you serve in all three capacities when you set up a Living Trust and then specify a Successor Trustee to take over the management and a Successor Beneficiary to reap the benefits of the Trust after your death. When you set up a Living Trust, you should transfer all of your testamentary property into the Trust during your lifetime, so that when you die you, personally, do not own anything; rather, all of your estate is part of the Trust. A properly executed Living Trust helps avoid probate, manages your assets during your lifetime, and provides for your loved ones after you die.

A Living Trust is also a highly private document. It does not need to be filed with the clerk in order to be processed, so you can transfer your estate without anyone being able to pry into your personal affairs. Privacy is a large concern for many people in non-traditional relationships. Over the course of your life, you may have chosen to keep your relationship status private from your family and community. A Living Trust will maintain this privacy after you die. You can

also use a Living Trust alongside a Last Will and Testament to privately dispose of part of your estate while publicly probating the remainder, if you so wish.

PART 3: Managing Financial Affairs

THE FIVE LEGAL STRATEGIES FOR MANAGING YOUR FINANCES

If you become disabled, your daily financial management regime could be brought to an untimely halt. No one possesses the inherent authority to manage your financial affairs for you, not even your spouse. Someone (a friend, loved one, a trusted professional, or a Guardian) must be legally authorized to take care of your business as your representative.

There are five general categories of strategies for sharing your decision making rights:

1 - Judicial Solutions. Court-mandated administration is comprehensive and powerful and is the default solution. Avoid it unless absolutely necessary. Guardianship comprehensively strips the ward of their decision-making rights, requires court order, and is expensive and slow. Community Administration is slightly easier, but requires a capable spouse to take court action.

2 - Social Security Representative Payee. A person may apply to the Social Security Administration to manage the monthly check received by a retiree. This solution is strictly limited to Social Security issues.

3 - Shared Accounts. Shared bank accounts are a useful tool to share finances. Take care, different types of accounts allow different degrees of access and without caution can inadvertently affect the ownership of deposits. The account creator retains ultimate authority over the account itself, but authority over the deposits depends on the type of account.

4 - Power of Attorney. A Durable Power of Attorney empowers an Agent to act behalf of the client. This solution offers immediate relief with great flexibility at a reasonable cost and allows the creator to retain full control and autonomy.

5 - A Trust. A Living Trust can manage your finances during your lifetime and simplify the administration of your estate after your die. This solution is highly effective, but often a Trust cannot handle certain details. Living Trusts, Testamentary Trusts, Charitable Trusts, and other types of Trusts are discussed in various parts of this book.

STRATEGY 1: JUDICIAL SOLUTIONS

Guardianship

Avoid Guardianship. Guardianship strips authority from one person (the “Ward”) and places it into the hands of another person (the “Guardian” or “Conservator”). It is not voluntary; rather, Guardianship can be forced upon you if and when someone thinks you have become

incapacitated and the court agrees. Guardianship is invasive, expensive, and slow.

Whenever possible, your legal plan should be arranged to eliminate the need for Guardianship. This can be achieved through properly drafted, executed, and maintained Financial (Durable) and Medical Powers of Attorney.

Powers of Attorney offer privacy, flexibility and convenience. With a Durable Power of Attorney for Financial and Business Matters, a Guardianship over "the estate" can be avoided, since you have already selected someone to assist with finances. With a Medical Power of Attorney, a Guardianship of "the person" can be avoided, since power to make health care decisions has already been delegated.

Declaration of Guardian

A Declaration of Guardian gives you the authority to nominate who should serve as your Guardian should the need arise.

It is uncommon for someone to try to force a Guardianship upon someone who has taken the time and energy to execute Powers of Attorney. Often the person who would initiate Guardianship proceedings is the Agent nominated in your Powers of Attorney. Your Agent is someone who is interested in your well-being and wants to care for you. Their desire to help you will generally be satisfied with the role they serve as your Agent. But, as people are living longer, there is always the chance that some relative, unhappy about your

decisions, will try to take power over you. Guardianship voids any Powers of Attorney you created. A "Declaration of Guardian" will give you a good chance of choosing who will serve as your Guardian.

Any competent adult may make a Declaration of Guardian. Your Declaration cannot be verbal; it must be formally drafted and executed in accord with the laws of your state. Your attorney will be able to guide you on proper execution of the document. In it, you list your first choice for Guardian and several alternatives. If your first choice is not available when needed, your alternates will be in line to step in when needed.

A key feature of a Declaration is that it gives you the power to disqualify an individual from ever becoming your Guardian under any circumstances. This protects you from people you may want to avoid, such as former spouses and intrusive relatives. Ask your attorney how a Declaration can help you retain control over your future if a Guardianship is ever needed.

Signature for the Disabled

If you are mentally competent but physically incapable of signing your name, someone you select can sign a Declaration for you. The signing must take place in your presence and under your direction.

Holographic Declaration

Texas law allows you to create a "holographic" Declaration of Guardian – that is, one that is written entirely in your own handwriting and signed by you.

Although not easily enforceable, it is a valid Declaration and does not require witnessing. All you need to do is write down who you want to serve as your Guardian and sign the document. While it is wise to put a date on the document, the law does not require it to be dated.

A holographic Declaration is better than no Declaration, but it will ultimately cost you more in legal fees and take more time than if you had spoken with an attorney initially. The very informality of the document means that there is no proof that you signed the document of your own free will, that you were competent when you signed the document, and that the document is valid. For example, two people who know your handwriting and who can testify that you were competent the day you wrote the Declaration will need to appear before the Judge. Those are hurdles that you should avoid and which are easy to avoid by talking with your attorney.

Using a Declaration of Guardian

You do not need to file your Declaration of Guardian with the court in advance; however, the person you chose as Guardian will need to file it when and if he or she goes to court to become your Guardian. Timing is crucial; it must be filed after someone starts the Guardianship process (by filing an Application for Guardianship) and before the Judge signs an order appointing a Guardian. In reality, that gives you and your chosen Guardian about a three-week window to bring your Declaration of Guardian to the court's attention.

Keep the original in a safe place, and let your intended Guardian know about it. Most likely it will be your nominee for Guardian who files it with the court.

You can revoke your Declaration of Guardian by tearing or shredding it, or by making a new Declaration that supersedes the outdated one.

Guardianship for Incapacitated Adult Children

Once a person turns 18 that person is legally considered to be an adult. The law presumes an adult is capable of handling their own affairs. What if, in fact, that person does not have capacity? If that "adult" is intellectually disabled or otherwise incapable of managing themselves since childhood, then a Guardianship may be necessary for the parent or a responsible relative to continue to provide care.

When you become Guardian, you have legal authority to manage the person. But, as an aging parent with a middle-aged child, you may wonder what will happen when you die or if you become incapacitated.

When that happens, the court must select a replacement Guardian. Any interested person can apply; family has priority, but any person could become Guardian. If there is someone who you feel would be an appropriate Guardian, you can designate that person (and alternates) as successor Guardian. You can therefore arrange for the care of your incapacitated adult child by selecting a replacement Guardian who shares your values and will care for your adult child in the way you prefer.

In Texas, designation of a successor Guardian is done by the Guardian either in their Will or in a separate legal document. The requirements for a non-Will declaration closely resemble those for a Declaration of Guardian – except that this is called a “Declaration of Appointment of Guardian for my Children in the Event of my Death or Incapacity”. One major difference: you cannot “disqualify” someone from serving as Guardian – you can only affirmatively select a successor. The court must appoint your selection, unless that person refuses the job or is disqualified for some other reason. Then the court can open the job to anyone interested.

Community Administration in Texas

A competent spouse can become “Community Administrator” for their marital estate if their spouse becomes incapacitated and avoid Guardianship. Community Administration requires that the estate consist of only community property. Guardianship can also be avoided if the incapacitated spouse signed a Durable Power of Attorney or created a Living Trust when they were competent. Pre-planning is almost always less expensive and superior to court action.

Community Administration law is actually tucked into the Guardianship portion of the Texas Estates Code[14], so it is not well known. Think of it as a “half-way

---

[14] Texas Estates Code, Title 3, Subtitle I, Chapter 1353

Guardianship". The competent spouse is still required to pay an attorney and court costs, and to appear before a Judge. The Judge's job is to decide if the other spouse has truly become incapacitated. As such, evidence based on a doctor's testimony must be provided.

Authority to manage, control and dispose of community property vests in the Community Administrator. The appointment as court appointed Community Administrator, although more expensive and time consuming than a Durable Power of Attorney, even gives the healthy spouse power to sell the homestead without the incapacitated spouse's signature.

Community Administration and Separate Property

If the incapacitated spouse has any separate property, a Guardianship is required. The well spouse will be appointed Guardian unless they decline or are found unfit (but they are presumed to be suitable for the job).

If the court finds the competent spouse is not qualified to be community administrator and Guardian, then the court must appoint someone who is qualified. Preference goes to close relatives, but anyone who asks to be Guardian and is not disqualified can be appointed.

In that case, the Community Administration has failed. The competent spouse has no authority, and can be ordered to turn over the ward's interest in community property to the Guardian (in addition to the separate property over which the Guardian already has control).

Strategy 2: Social Security Representative Payee

A Social Security Representative Payee receives a retiree's Social Security check and controls the funds to pay for the retiree's expenses. A Representative Payee is legally obligated to use the money for the retiree's expenses, and according to Social Security has the following specific duties:

- Determine the beneficiary's needs and use his or her payments to meet those needs;
- Save any money left after meeting the beneficiary's current needs in an interest bearing account or savings bond for the beneficiary's future needs;
- Report any changes or events which could affect the beneficiary's eligibility for benefits or payment amount;
- Keep records of all payments received and how they are spent and/or saved;
- Provide benefit information to social service agencies or medical facilities that serve the beneficiary;
- Help the beneficiary get medical treatment when necessary;
- Notify the Social Security Administration (SSA) of any changes in your (the payee's) circumstances that would affect your performance or ability to continue as payee;
- Complete written reports accounting for the use of funds; and,

- Return any payments to which the beneficiary is not entitled to SSA.

SSA can (and will) monitor the activities of a Representative Payee. If the Representative Payee misapplies any funds, they may be liable for wrongdoing.

When a Social Security Representative Payee is an Option

You may become "Representative Payee" for a retiree who:

- Is incompetent;
- Is incapable of managing their Social Security benefits; or,
- Is legally disabled.

If someone you care for fits any of those categories, you can call the local Social Security Administration office to request form SSA-11-BK. You must file it with proof of your identity, and under most circumstances you must have a personal interview before appointment.

Before appointment, SSA must notify the retiree in writing that you have applied. If the retiree does not want you to be their Representative Payee, the retiree can contest your action and has the right to appeal a prior appointment.

STRATEGY 3: SHARED ACCOUNTS

How you set up your bank and brokerage accounts is as important as where you form them and what you put into them. In order to keep your funds secure, carefully consider who can access your funds and who might be able to claim ownership of your funds.

Banks, savings banks, and credit unions are resourceful when it comes to marketing their services. They offer savings, checking, money funds, and certificates of deposit, marketed under fancy names. Opening a "Super Savers" account or "Special Senior" account may save you a few dollars on your monthly bank fees, but the marketing names are mostly hype. The important thing is how your account is legally classified, who will have access, and who may claim ownership.

State banking regulations control the types of accounts banks can offer in each state[15].

Types of Accounts

There are a limited number of types of accounts under state law. The type of account will determine what happens to the money in it while the creator is alive and

[15] Texas Estates Code, Title 2, Subtitle C, Chapter 113; Washington Financial Institution Individual Account Deposit Act, RCW 30A.22.050.

may also determine what happens to the money in it when the creator dies.

Unfortunately, most banks avoid uniformity and consistency. Their desire to use their own forms and marketing-inspired bank account titles only serves to confuse customers.

When setting up an account, take care to specify who can access the account and who will own the funds in the account. Access and ownership are not the same thing. Some accounts limit access to the person who created the account, others give access to multiple parties. Some accounts grant ownership to anyone with access, some limit ownership to the depositor. A decedent's Will ultimately determines ownership of some accounts; ownership of others is determined by the account type. The *STAUFFER V. HENDERSON* case is a fine example of this distinction.

Single Party Account

While the creator is alive, they are the only person who can access the funds in the account and they own the account. When the creator dies, the bank will freeze the account until their Will is probated and evidence of their heir's identity is provided.

Single Party Account with Pay on Death (P.O.D.)

With this type of account, as above, you are the owner and the only person with authority to access the account while you are alive. But, upon your death, the person(s)

you named on the account card become the owner(s) of the account. The P.O.D. arrangement supersedes your Will.

Let that point sink in for a moment. ***The P.O.D. arrangement supersedes your Will.*** A P.O.D. arrangement is non-testamentary disposition of the money in the P.O.D. account. What you sign at the bank takes priority; your money is not subject to the terms of your Will. If there is a conflict between your Will and your bank account arrangement, the Will loses. It is vital to properly coordinate your Will with your bank arrangements.

‖ *Multiple Party / Joint Account*

A multiple party account can have any number of co-singers and each signer may access the funds in the account without seeking permission from the other signers. The party who deposits funds in the account is the owner of those funds (unless the funds are community property, which belong ½ to each spouse).

When a party to the account dies, any money they deposited into the account passes according to the terms of their Will or (if there is no Will) by the laws of intestacy. However, the account is not frozen upon the death of its owner. Any signer to the account can withdraw the funds, even though they may not be the owner of the funds. This type of account may also be called Tenants in Common.

Multiple Party / Joint Account with Right of Survivorship

All of the features of this account are the same as a multiple party account with one important different. When a party to an account with rights of survivorship dies, the other parties to the account automatically become its owners. No probate is needed to access the account, and the right of survivorship (ROS) arrangement, just like a P.O.D. account, supersedes anything your Will might say about the account.

Multiple Party / Joint Account with Right of Survivorship AND Pay on Death

This account has all the features of a multiple party account with right of survivorship, as each party to the account dies the other parties automatically gain ownership over the account. The difference is that when the last party to the account dies, a designated beneficiary, who did not have prior access to the account, becomes owner of the account.

> For example: Al and Betty open a joint checking account with right of survivorship to each other, but P.O.D. to their son Ted. Only Al and Betty can access the funds. If Al dies, Betty becomes owner by ROS and only she can access the funds. When Betty subsequently dies, Ted becomes owner of the account even though he had no right to touch it before Betty died.

Trust Account

A Trust Account administers money you want to keep separate from the rest of your estate. Your bank may refer to this type of account as a Totten Trust (after a famous 1904 case in which the Totten family were the litigants). When you set up a Trust Account you list a Trustee who can access the account and is owner of the account; you can list yourself as Trustee. You also list one or more beneficiaries who do not have access to the account but become owners of the funds when the Trustee dies.

Totten trusts are different from Living Trusts, discussed later. A Living Trust is flexible and allows you to define your goals and design the trust to meet those goals. A Totten Trust is rigid, giving you no design options at all; it must be paid out to the beneficiaries upon the trustee's death.

Convenience / Agency Account

A Convenience or Agency Account is different from all other types of accounts. It is designed based upon the premise that you want to provide your co-signer access to funds in order to manage your expenses without affecting ownership or control of the account Here are its important features:

- You set up a Convenience Account in your name, allowing one or more co-signer access to the account. The co-signer can withdraw funds.
- The funds in the account belong to you. When you put money in the account, a co-signer does not

become owner of the funds. If a co-signer puts money in the account, you are the owner of those funds.

- You can "lock out" a co-signer by informing the bank, in writing, that access should only be allowed with your permission. The bank can impose its own procedures on this option, so be sure to discuss it with them before trying to lock out your co-signer. (With a more typical joint account, once you have added someone else's name to the account you cannot take that name off without that person's cooperation short of closing the account).
- A co-signer does not have a right of survivorship to the account when you die.
- When you die, a co-signer can withdraw the funds if the bank has not received written notice of your death. The bank has no legal liability if it turns the money over to a co-signer. If the bank has received written notice of your death, the account is frozen until the Will is probated.

State law also allows you to name one or more co-signers. Also, a husband-wife team can own a Convenience Account and can name one or more other persons as co-signers.

Convenience Accounts and Agency Accounts have been legal in Texas and Washington for more than a decade, but not all banks have chosen to make them available. If you can find one, it is an effective tool to grant access to your funds while retaining the right to unilaterally change your mind and cancel that access. A Convenience Account allows you to retain ultimate

control over the account, allows you to change your mind, and allows you to "fire" the co-signer for any reason at any time.

Joint or Joint and Several: "And" v "Or"

When setting up your bank accounts, two seemingly innocuous words are vitally important: "AND" and "OR". If two names go onto a bank account, you need to pick between "and" and "or" to join them. What happens when you choose, and why is it important?

The word "and" binds the two listed people together as a single unit. If the account lists "Herschel and Bernice," the bank must deal with both of them.

The word "or" gives the bank a choice between the two people. If the account lists "Herschel or Bernice," the bank can deal with either one of them.

Choose carefully when you put another person's name on your bank account. Setting up an account that allows unrestricted access by the cosigner can be dangerous. If your cosigner is unethical, you may lose your money. An "AND" account exists to require double signatures. Keeping your account solo can protect your funds, but the lack of accessibility by a second person might also cause troubles down the line.

Bank Accounts with Right of Survivorship

A "Right of Survivorship" is an easy way to give someone ownership of an asset when you die. A Right of Survivorship can be created by agreement or gift.

Often, Right of Survivorship is created by agreement between two or more people when they set up a bank account. The co-owners can either create the ROS when they initially create the account by clearly stating in the account agreement that they intend to create a ROS. Alternatively, the co-owners can create the ROS years later by changing the account agreement to indicate clearly that they want the property to pass with ROS.

> For example, spouses can agree in writing that all of their community property will pass to the survivor between them when one of them dies. This is a "Community Property Survivorship Agreement".

Survivorship rights can also be "given" by the current owner to a third party.

> For example, a father can place his daughter's name onto his bank account and instruct that the bank pay all sums he has on deposit to his daughter when he dies. However, the agreement must be in writing, must be signed by father and daughter, and must specify that "Right of Survivorship" is being granted.

Use Right of Survivorship with Caution

Survivorship rights override a Last Will and Testament and thus may block the intentions expressed in a Will. They should only be used with caution.

Some banks try to open all new accounts automatically with Right of Survivorship. This can cause many problems, **because survivorship rights supersede your Will**. To help solve this problem, state law allows the use of the Uniform Single Party or Multiple Party

Account Form, but many banks have decided not to adopt it. They continue to use their internally approved forms, so the papers you see from bank to bank will be quite different.

Here is an example of how Right of Survivorship can interfere with the plan in your Will:

> Sheryl has three adult children. She intends for her assets to pass equally to all three children when she dies, and creates a proper Last Will and Testament.
>
> Her oldest son has been helping Sheryl pay bills and she decides it is time to put his name on her checking account. When she changes her account at the bank, Sheryl is not careful and the new signature card creates a Right of Survivorship for her son. The bank clerk does not point this out, and Sheryl does not read the fine print on the account agreement.
>
> When Sheryl dies, her checking account contains nearly all of her assets. Her son, as survivor, becomes the owner of that money regardless what she said in her Last Will and Testament. The result: her son gets the bank account and the other children are unable to inherit from their mother.
>
> This is not the equal distribution Sheryl wanted! When the bank created survivorship rights without making an issue of the impact, they altered her estate plan.
>
> Instead, Sheryl should have used a convenience account to grant her son access to her checking account while retaining ownership.

Working together upon your death your Last Will and Testament and Survivorship rights can pass your assets

with ease. But, working against each other, they can create chaos, misery, and strife.

Your accounts should always harmonize with your Last Will and Testament. Check with your bank to see how your accounts are set up. Ask to see the "signature cards" that contain your agreement with the bank. Do not rely on the printed monthly statement.

Stauffer v. Henderson

A Right of Survivorship is an extremely useful and cost effective technique for avoiding probate. However, it is a double-edged sword and must be used property or it will not work for you and ***may even work against you***. A primary example of the failure to properly use Right of Survivorship was decided by the Supreme Court of Texas in 1990 through its decision in *Stauffer v. Henderson*[16].

Marion Henderson and Mary Stauffer were sisters. Henderson opened a bank account. All money in the account came from Henderson, who put her sister Stauffer's name on the account as Joint Tenant. The account card read as follows:

> "…upon the death of either of us any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor. It is especially agreed

[16]Stauffer v. Henderson, 801 S.W.2d 858 (1990).

> that withdrawal of funds by the survivor shall be binding upon us and upon our heirs, next of kin…"

Marion Henderson died, and Mary Stauffer withdrew the money. J.D. Henderson, Marion's husband, sued to get the money back. He claimed that half the money was his because of community property laws and that the other half belonged to his wife's estate (and should pass according to her last will and testament).

The Supreme Court of Texas ruled in favor of Mr. Henderson. The Court said that the account card did *not* create a Right of Survivorship even though it appeared to give the money to Mary Stauffer. Instead, the wording of the account agreement did no more than authorize withdrawal of funds by Mary Stauffer. The ability to withdraw the money (access) contrasts with the issue of survivorship (ownership).

Years ago, most state laws were re-structured to eliminate any "presumption" that Right of Survivorship exists simply because two names are listed on an account. The only thing that can create a binding Right of Survivorship is a written agreement (like an account card) with precise wording signed by all parties. Then the question becomes: what wording must the account card use in order to create survivorship rights?

In the *Stauffer* case, the Supreme Court of Texas decided special language must be used. Saying "joint property" was not enough. Instead, the agreement must explicitly say the account is held as "Joint Tenants with Right of Survivorship" to create a valid survivorship agreement. The Uniform Single Party or Multiple Party

Account Form was designed to prevent this confusion, but not all banks use it.

If you intend to set up a joint account with Right of Survivorship, be certain that the words "Joint Account with Right of Survivorship" are written into the account agreement. Also, be certain that both you and the intended survivor sign the account card.

Tenants by the Entirety

Tenants by the Entirety is a historic account designation commonly used in other States but hardly ever used in Texas or Washington.

"Tenants by the entirety" may only be created by a married couple. In states where it is used, it means, "we are married, we both own this equally, and when one of us dies, the surviving spouse owns it automatically". That is essentially the same as "joint tenants with right of survivorship" – except that a joint tenancy can be formed between any two competent adults while "tenants by the entirety" only applies to a married couple.

Online Banking

Most modern banks offer some type of online banking. Online banking is convenient and it provides a useful way to help aging family members maintain independence with limited minimally invasive oversight from you.

Many banks have signed-on with Quicken™ and Quickbooks™. Some banks have their own systems that work directly over the Internet. If you feel online banking would be valuable in your situation, ask your bank which approach they support.

Federal Deposit Insurance

The Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA) are federal agencies set up by Congress to underwrite bank deposits in case the financial institution becomes insolvent.

In 2005, Congress voted to increase the deposit amounts that the FDIC and NCUA can insure. This increase, the first in 25 years, took two forms.

The limit on *retirement accounts* jumped from $100,000 to $250,000. Accounts covered include traditional and Roth IRAs, self-directed Keogh accounts, "457 Plan" accounts for State government employees, and 401(k) accounts.

The limit on *regular accounts* (savings, checking, CDs, money markets) remained at $100,000 per depositor. In 2008, a temporary increase to $250,000 was approved for regular savings. It was to expire on December 31, 2009, but it was made permanent in late 2009. In 2016, $250,000 is still the limit.

The current $250,000 limit is per depositor, per institution. If you are married and have a joint account,

the account is covered to $500,000 at a single institution.

These higher limits have largely done away with the practice of adding people to your account just to get more coverage. It was fairly common to obtain extra coverage from adding the names of your adult children to various accounts. An unmarried person with no children would have fewer options to expand deposit insurance coverage under federal rules – but adding siblings or parents (if still living) to accounts might expand insurance coverage. The rules allow siblings, for instance, to each deposit $250,000 in joint accounts with full insurance coverage.

The rules can be tricky. For example:

> For instance, if Ted deposits $275,000 of his own funds and his brother Fred deposits $75,000 of his own funds, Ted's coverage still stops at $250,000. But, if the funds are co-owned (each sibling owns ½) then the entire account balance is insured.

People can gain additional personal coverage by creating a Revocable Grantor Trust (a Living Trust), additional coverage for business accounts (partnerships and corporations), and additional coverage for custodial accounts under the Uniform Transfers to Minors Act.

The FDIC has rules for insurance coverage of accounts owned by Living Trusts. Coverage extends to $250,000 for each "qualified trust beneficiary". Most close family members are qualified trust beneficiaries – your spouse, children, grandchildren, parents, and siblings. They are

covered even if their interest in the Living Trust is contingent on some future event (unlike the old rules, which refused coverage if it was possible under some circumstances for a beneficiary to be cut-out under the trust's terms). The FDIC is also dropping the requirement that your bank keep track of the beneficiaries, easing their paperwork requirements. Here are some examples of how the new rules operate:

Example One

You are single and as grantor establish a Living Trust that names your four children as beneficiaries. The FDIC coverage is $1 million in a single bank.

Example Two

You are married and as grantor establish a Living Trust with your separate property that names your spouse as beneficiary (when you die). The FDIC coverage is $250,000. Your spouse is the only qualified beneficiary. The limit remains $250,000 so long as your spouse is alive (even if you list your four children as secondary beneficiaries to get the funds in case of your spouse's death). If your spouse dies before you, those four children then become primary beneficiaries so coverage increases to $1 million.

Example Three

You are married and both spouses as grantors create a Living Trust with community property, setting up the Trust for both spouses' benefit and for the benefit of four children after both spouses die. Then: 1) there is $1.5 million coverage while both spouses are alive, and 2) after one grantor/spouse dies, FDIC coverage is

cut back to $1.25 million. Each grantor gets $250,000 per qualified beneficiary.

STRATEGY 4: POWER OF ATTORNEY

With a Durable Power of Attorney, a person (as a "Principal") delegates authority to act on their behalf to a representative (called an "Agent"). Principals retain full and unrestricted rights to manage all their business and financial matters. The Agent may act on their behalf with whatever powers the Principal chose to delegate to them, but they do not supplant the Principal.

An Agent is a fiduciary of the Principal. Before they take any action on behalf of the Principal, an Agent must ask themselves two questions:

First: "Am I authorized by the Durable Power of Attorney to do this action?"

Second: "Does this action benefit the Principal?"

They can only act if the answer to both these question is in the affirmative.

Many Powers of Attorney grant broad general powers. But, a Principal can be highly specific and grant only narrow powers. For estate planning, the powers granted are usually extensive to allow an Agent flexibility to manage all of the Principal's affairs.

Take caution when choosing an Agent. If the powers are broad, the Agent might dishonestly use assets for their

personal gain. If you are uncertain that you have anyone you can implicitly trust, consider a Living Trust (drafted by a Certified Elder Law Attorney, not an illegal trust mill) rather than Powers of Attorney.

Durable Power of Attorney

Financial Powers of Attorney can be broken down into two types: “durable” and “regular”.

A Durable Power of Attorney remains in force even if you are disabled. Unless you revoke it, your Durable Power of Attorney continues to work until you die, regardless of the state of your health.

A Regular Power of Attorney, on the other hand, ceases to function if the Principal become incapacitated. If the Principal’s goal is to create a limited Power of Attorney to authorize an Agent to buy real estate on their behalf or manage their brokerage accounts, a Regular Power of Attorney is clearly the right choice. However, as a normal part of a long-term estate plan, a Regular Power of Attorney falls short. Durable Powers of Attorney are therefore the proper choice for the vast majority of people.

Durable Powers of Attorney would not exist without a statute as their source. Hence, to create and use a Durable Power of Attorney, you must follow the instructions included in state law.

Note that in this section we are discussing Financial Durable Powers of Attorney. A Medical Durable Power

of Attorney requires a distinct set of authorizations, which we discuss later in this book.

Springing Durable Power of Attorney

A Durable Power of Attorney can further be broken down into two types: "immediate" and "springing".

An immediate Durable Power of Attorney comes into effect immediately when the Principal signs it.

A springing Durable Power of Attorney comes into effect upon the disability of the Principal. The concept of a springing Durable Power of Attorney has been used for decades, however state legislatures have only recently granted statutory authority. Older springing Durable Powers of Attorney are effective but should be reviewed and updated.

Comerica Bank vs. Texas Commerce Bank: Old Springing Powers of Attorney Are Valid

Current Texas Law reflects a case decided by the Court of Appeals in Texarkana in August 1999. In *Comerica Bank vs. Texas Commerce Bank*[17], Mrs. Bradfield wrote a springing Durable Power of Attorney which she executed in 1986. In 1995, she became disabled, and her Agent transferred some of her assets into a Trust with

[17]Comerica Bank-Texas v. Texas Commerce Bank National Association, 002 S.W.3d 723 (1999).

Comerica Bank using the springing Durable Power of Attorney.

In 1997, Mrs. Bradfield died, and Texas Commerce Bank was appointed as her Executor. As Executor, they wanted the assets moved back to her estate so the funds could be given to the heirs named in her Will. Comerica Bank argued that 1) the assets were legally part of its Trust, 2) the assets should go to the Trust's beneficiaries, and 3) the springing Durable Power of Attorney had been legal.

The Court decided that while there was no explicit statute allowing springing Durable Powers of Attorney, they were indeed legal. Reviewing the law, the Court recognized that it had been legal to make powers of attorney that commenced at some future time, for instance, "this Durable Power of Attorney becomes valid when I leave for Europe" or "when I buy a new business". If a Durable Power of Attorney could be written to commence at some future event, then a Durable Power of Attorney could also legally commence "when I become disabled".

However, even though a pre-1993 Springing Durable Power of Attorney may be valid, no one wants to go to court to enforce his or her wishes. The best thing you can do is to have a current Durable Power of Attorney – based on your State's current Power of Attorney Act (the Texas Act was most recently updated in 2001, and the Washington Act will be updated on January 1, 2016). Then it will clearly be legal and will clearly be useable without a court battle.

Legal Capacity to Make a Power of Attorney

Many elderly people may find it challenging to understand complex financial transactions. Age can bring many unpleasant effects, including memory loss and dementia. Nevertheless, age does not universally cause mental instability, and the law does not allow us to presume incapacity only because of age. In addition, a person's location or status as a hospital patient does not eliminate the ability to create a binding Durable Power of Attorney. Everyone, including seniors, is presumed to have legal capacity until proven otherwise. Still, anyone under stress or with diminished capacity should be very careful to show that they understand the transaction into which they are entering.

Edward D. Jones v. Fletcher: Seniors Are Competent Until Proven Otherwise

In the *Fletcher* case heard before the Supreme Court of Texas in 1998, a stockbroker assisted an elderly client in transferring several hundred thousand dollars of stock to her nephew[18]. The broker had never met her before, and went to her house so she could sign the transfers. He met with her alone for several hours.

---

[18] Edward D. Jones v. Fletcher, 975 S.W.2d 539 (Tex. 1998).

A year later, the client's niece decided she was unhappy with the transfers. The niece initiated a Guardianship proceeding over her elderly aunt, and was successful in showing that her aunt was incapacitated at the time she appeared before the Judge. Now her aunt's Guardian, the niece/Guardian sued the stockbroker.

The jury thought that the broker's actions were negligent and/or a breach of fiduciary duty, and that the broker had used "fraudulent, manipulative and/or deceptive" actions. However, the jury did not find that the aunt was incapacitated at the time she worked with the broker.

On appeal, the broker claimed that his only duty to the aunt was to faithfully to carry out her instructions. (Liability for an act will only arise if the act breached a legal duty). In response, the niece argued that the stockbroker should know, because of the client's age alone, that she would not understand the transaction.

The Appeals Court acknowledged that there is a real risk that an elderly person may not understand a complex financial transaction. It chose, however, to balance that risk against the need to provide services to everyone in the same manner, regardless of age. As such, the Appeals Court decided that there is no responsibility on the part of "service providers in general or stockbrokers in particular" to determine the competence of their clients.

The Court stated that, "Stockbrokers and other service providers cannot be expected to have any expertise in assessing mental capacity… A service provider should

not be put to choosing between refusing to assist an elderly person with legitimate transactions and incurring liability for providing such assistance when the provider lacks any qualification for determining competence”.

Old age is not legal grounds for denial of services. It remains illegal to defraud another person, whether young or old. However, a service provider does not have a legal duty to assess their client’s mental competence before providing a service, and they should presume legal capacity unless proven otherwise.

Ability to Sign

Generally, a person must be able to sign a legal document in order to execute it. This rule is not universal.

A person’s signature does not have to be beautiful or presentable in order to be effective. Too often, an elderly person’s signature is shaky, wavy, or unreadable. That does not matter. Some people do not have a very legible signature even when in good health (is your doctor’s signature legible?). A mark is often enough to act as a signature.

Texas law allows a Notary Public to sign on behalf of a person who, despite having adequate mental capacity, cannot make a signature or mark due to a physical impairment. Alternately, in Washington State, a notary may certify that an individual intended to sign a document but was unable to complete the physical act.

Using these laws, even a mentally competent person who cannot physically sign can create a valid estate plan. If the person is mentally impaired, however, this law does not help.

Selecting an Agent

The lynchpin of a Durable Power of Attorney is the person, or persons, selected to act as Agent. The most common approach is to name a single person to act as Agent with named alternate Agents who can act if the first choice dies or becomes incapable of action. In this way, only one agent will be able to act at a time.

Slightly more uncommon, but no less valid, is to name two or more Co-Agents at the same time with successor Agents to step into their shoes if necessary. The trick with Co-Agents is to define clearly whether your Co-Agents must all act together at all times, or whether you will allow one of them to act unilaterally and independently.

Musquix v. Marroquin: Independent or Joint Co-Agents

In *Musquix v. Marroquin*, the mother signed a Durable Power of Attorney appointing Daughter and Son as Co-Agents[19]. Daughter did some repairs to mom's house,

[19] Musquiz v. Marroquin, 124 S.W.3d 906 (Tex. App. Corpus Christi-Edinburg 2004).

and then (acting alone) sold Mom's house to herself (using the Durable Power of Attorney to sign Mom's name to the deed).

About six months later, Mom died and Son probated her Will. As Executor, Son discovered the house had been deeded out of the estate. That did not sit well with him or with the other heirs, so he sued his sister for return of the property. He claimed that by acting alone, she had misused the Durable Power of Attorney.

The Court agreed with the Son, and ordered the house returned to the estate. Since the Durable Power of Attorney had appointed both Son AND Daughter as Agents, the Court concluded that they were required to act jointly whenever the Durable Power of Attorney was used. By implication, if the Durable Power of Attorney had appointed Son OR Daughter as Agents, Mom would have authorized either of them to act alone, and the transfer of the house would have been upheld.

Thus, the wording of a Durable Power of Attorney is key. Co-Agents may act either jointly or independently. The wording must be clear and the courts are likely to require joint action by default.

Even if you allow Co-Agents to act independently, you can still give them authority to keep an eye on each other. By law, your Agent must keep you fully informed of all actions taken under the Durable Power of Attorney. You can delegate that oversight position by asking your attorney to state in your Durable Power of Attorney that any action taken by only one Agent must be promptly reported to the other Agent, and that all

books and records are open to inspection by both Agents.

Agent Responsibilities: Fiduciary Duties

An Agent must act for the benefit of the Principal and in accord with the Durable Power of Attorney. If they do not, their act may have civil and criminal liabilities.

For example, the Texas Penal Code[20] says that if an Agent intentionally, knowingly, or recklessly misapplies assets – that is, they Agent use them in a way that is not beneficial to the Principal or in a way that contradicts the Durable Power of Attorney – the act may be criminal.

The offense is called "Misapplication of Fiduciary Property". If convicted, the Agent's punishment is keyed to the value of the misapplied assets. For instance, if the amount is less than $20, the crime is classified as a Class-C misdemeanor, punishable by a fine no greater than $500. It reaches the level of "State jail felony" if the amount is between $1,500 and $20,000. And it is a first-degree felony – punishable by 5 years to life in prison and a $10,000 fine – if the amount misappropriated exceeds $20,000.

[20] House Bill 1813 passed by the 2001 Legislature and effective September 1, 2001.

The penalties are enhanced if the offense is committed against an elderly individual (who is, for these purposes, someone 65 or older). Hence, if an Agent misapplies fiduciary funds – say, in the amount of $2,000 – for a Principal who is 60 years old, the offense is treated as a "State jail felony". But if the same act is done to someone who is 65 years old, the offense is a third-degree felony. The punishment for a State jail felony is 180 days to 2 years plus a fine up to $10,000. The same crime committed against an elderly person is punishable as a third-degree felony with 2 to 10 years plus a fine up to $10,000.

Accounting Responsibilities

An Agent has the legal duty to keep the Principal informed and to account for actions taken pursuant to the Durable Power of Attorney. Failure to tell the Principal about a particular act does not invalidate the act, but the failure is a breach of fiduciary duty. An Agent is required to keep a record of each action taken and each decision made. Part of that record keeping should be to provide a copy to the Principal on a routine schedule.

At any time, the Principal can ask for a full accounting. If the Agent has been routinely providing information, then a demand for accounting becomes unlikely. The Principal or a court can order the Agent to provide an accounting, and the Agent must deliver it within 60 days (or longer if the Principal or court sets a longer period). If the Agent does not promptly deliver the information, the Principal can sue to force an accounting, to retrieve the assets, and to cancel the Durable Power of Attorney.

An Agent must be able to provide all of the following in complete detail:

- A list of the property belonging to the Principal that has come to the Agent's knowledge or into the Agent's possession;

- A list of all actions taken or decisions made by the Agent for the Principal;

- An account of receipts, disbursements, and other actions of the Agent, including their source and nature, with receipts of principal and income shown separately;

- A list of all property over which the Agent has exercised control, with a full description of each asset and its current value (if known);

- A statement of the cash balance on hand and the name and location of the depository where the balance is kept;

- A list of all of the Principal's liabilities that are known to the Agent; and,

- A list of whatever other information the Agent has for a full and definite understanding of the exact condition of the Principal's assets.

The Agent must keep all these records until they are either: 1) delivered to the Principal, 2) the Principal releases the Agent from the obligation, or 3) a court discharges the Agent.

Master Digital Password List

A few years ago, it was common for our banking records, brokerage records, and correspondence to be in paper form. We got most of our records in the mail and filed them as necessary in filing cabinets. Currently it is very common for our financial records to be digitally transmitted, received, and stored. Because computerized records are private, they are frequently password protected.

If you became incapacitated, would your Agent have access to your password list? Do you even maintain a password list? If not, you should create one both for your own use and for your Agent. Your list should be password protected and stored in a safe digital location. Consider storing the list in the cloud, with a service like Microsoft's OneDrive. Give your Agent the website address, login information, and name of your password file.

Securities Requirements

Even if an Agent has a valid general Durable Power of Attorney, they may run into frustrating roadblocks. At times, dealing with securities (stocks and bonds) through a brokerage can present difficulties. The problems grow from two factors:

First, state law does not require anyone to accept your Power of Attorney. In Texas, the Legislature changed the Durable Power of Attorney statute in 1993 to revoke an important provision which required a third party—like a bank or broker—to accept a Power of Attorney,

so long as they were indemnified. There is no legal requirement in the current statute that a Power of Attorney must be accepted.

On the brighter side, the 1993 law change also allowed Powers of Attorney to be more standardized. One of the standard categories (section 494 of the Durable Power of Attorney Act) goes into great detail about an Agent's authority to buy and sell stocks. So if your Durable Power of Attorney is <u>current and up-to-date</u>, you have a very good chance that it will be accepted.

Second, stock brokerages are regulated by state and federal securities laws, which often impose more requirements than the regular Power of Attorney statute.

These additional laws allow brokerages to impose additional conditions on your Agent's use of their authority. For instance, the Texas Business and Commerce Code allows a brokerage to demand the document you present be "fresh"—even a court order can be rejected if the copy was certified by the court more than 60 days before you try to use it. The law also allows a Brokerage to impose their own standards, so long as the standards are "not manifestly unreasonable".

The bottom line is that dealing with securities is complex. To simplify the process, make sure your securities are in a single "street account". Your situation might also warrant establishing a Living Trust to manage the account, so that no Power of Attorney is involved.

When Powers of Attorney Go Stale

What if you have a Durable Power of Attorney that is 10, even 20 years old? Various law changes through the years have allowed documents that were legal under prior law to continue as valid. For instance, the 1989 law change required durable powers of attorney to be witnessed. But, it expressly accepted pre-existing un-witnessed durable powers of attorney as valid. The 1993 law change eliminated the witnessing requirement.

Even though law changes may not invalidate an older document, there is a good reason you should keep your Durable Power of Attorney up-to-date. I used to say: Older powers of attorney become “stale” after 8 to 10 years. We have heard from more than one bank that they do not want to use Durable Powers of Attorney signed more than 5 years ago. I am still fine with 8-10 years, but you should confirm with your bank. There is nothing technically wrong with older Powers of Attorney – but banks and brokers may simply refuse to accept them, fearing that the Principal may have made other plans during the interim. They prefer to err on the side of caution.

Keeping your Durable Power of Attorney current is much safer. Whenever there is a major law change, or at least every ten years, you should update your Power of Attorney. Then, if your Agent needs to use it when you are ill, the chances of success are enhanced.

Revocation and Termination of Powers of Attorney

A Durable Power of Attorney can be revoked by the Principal at any time and for any reason. Sometimes, revoking a Durable Power of Attorney is as simple as creating a new, replacement Durable Power of Attorney and shredding the outdated one. The replacement does three things: 1) it appoints a different Agent and alternate Agents, 2) it defines exactly what powers are being granted to the new Agent, and 3) it revokes the prior Power of Attorney.

However, signing the replacement Durable Power of Attorney is only the first step. You must inform your prior Agent that agency has been revoked. You should do so in a letter, sent by certified mail, return receipt requested so you have a written record that your prior Agent has been informed. Also speak with your prior Agent directly so they understand that the powers have been revoked.

Before using the Durable Power of Attorney, your Agent can be required to sign an Affidavit saying the Durable Power of Attorney has not been revoked and that you are, to the best of the Agent's knowledge, still alive. You should expect banks and title companies to require these Affidavits to be filed with the county clerk.

Revocation by Death of the Principal

Historically, a Durable Power of Attorney was terminated the moment the Principal died. However, current law in many does not revoke the Agent's power

until the Agent has *actual knowledge* of the Principal's death. What this means is that any action taken by the Agent, even after the Principal's death, is valid if the Agent did not know of the death. Of course, the Agent usually finds out about the Principal's death within minutes or hours, so the general rule that death terminates a Power of Attorney is still fundamentally true.

An Agent cannot use the Durable Power of Attorney after the death occurs as a means to settle the decedent's estate; that is where the Will and probate (or other estate planning tools) come in.

Revocation by Divorce

A Power of Attorney naming your spouse as Agent is automatically amended upon divorce to remove the former spouse from authority. In some states, such as Washington State after January 1, 2017, the automatic revocation occurs when the spouses file for divorce. In some states, such as Texas and Washington State until January 1, 2017, the revocation occurs when the divorce decree is signed by the judge. If you are in a divorce or planning a divorce, you should change your Durable Power of Attorney immediately.

STRATEGY 5: TRUSTS

Trusts are discussed in detail elsewhere in this book. Here are some links to those sections:

- Living Trusts
- Irrevocable Trusts
- Pet Trusts
- Gun Trusts

PART 4: Managing Medical Affairs

Informed Consent

All adults who are not incapacitated have the right to grant or deny consent to medical treatment. To be valid, consent must be "informed" — that is, given only after full disclosure of the risks and benefits.

As a rule, health care providers will not provide medical treatment without the patient's consent. Frequent medical malpractice claims have made health care providers wary. A patient, treated without proper consent, may charge the caregiver with negligence or even "battery" (unlawful physical contact).

If you become incapacitated, the law provides for three types of proxies who can provide informed consent in your stead: 1) a court appointed Guardian, 2) a default surrogate under your states' Default Surrogate Consent Statute, and 3) a duly appointed Agent in a Medical Power of Attorney.

Guardian of the Person

When Guardianship is authorized in Court, the Guardian of the Person is empowered to make medical

decisions for the Ward. Because of the complex reporting requirements and high cost of initiating a Guardianship, you should always choose one of the other methods for selecting a proxy decision-maker.

Default Surrogacy

As of 2014, most state legislatures have adopted a Default Surrogate Consent Statute to control who can provide informed consent for an incapacitated adult[21]. That person is called a default surrogate. Default Surrogate Consent Statutes (DSCS) serve two purposes. First, the DSCS facilitates rapid access to informed consent. Second, the DSCS alleviates the need for Guardianship in most medical scenarios. In many cases, this removes the burden from the courts and reduces the amount of time necessary to find a surrogate which can save patient's lives. By providing a definite line of command, the doctors and hospitals have someone to turn to for a decision, even if that person is their own staff clergy.

Default surrogacy laws do not require any action by the patient. They come into effect immediately when a

[21] States without Default Surrogate Consent Statutes: Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, Rhode Island, Vermont. "Default Surrogate Consent Statutes as of June 2014", American Bar Association (2014).

doctor decides the patient cannot provide their own medical consent. Once that decision is made, the patient's surrogate steps in to provide informed consent on the patient's behalf.

Medical surrogates in most states cannot provide informed consent regarding life support and whether it should be provided or withheld, or if life support has already begun whether it should be maintained or withdrawn. Life support decisions can only be made with an Advance Directive.

Surrogates also cannot provide informed consent for mental health treatment and admission to an inpatient mental health facility. Mental health treatment decisions can only be made with a Mental Health Advance Directive.

Check your state's Default Surrogate Consent Statute and speak to your attorney for details on your state's default surrogacy law.

Medical Surrogacy: The Texas Consent to Medical Treatment Act

The Texas Consent to Medical Treatment Act (CMTA) serves well as a model Default Surrogate Consent Statute. The CMTA provides a list of state-selected surrogates who may give informed consent for an incapacitated patient. They are, in order of priority and availability:

- The patient's spouse;

- The patient's children. A sole child may act if they have written permission from the other children to act alone. If the children have not selected a representative, medical decisions will be made by majority vote among the children;
- The patient's parents, if still living;
- Someone the patient "clearly identified" before becoming ill, such as the patient's Agent under a Medical Power of Attorney;
- Any other living relative; and,
- Any member of the clergy, whether or not you know that person.

It is best to plan ahead by using a Medical Power of Attorney to select exactly the right person as surrogate, instead of the person the legislature thought would be acceptable. In many instances, the surrogate will be the patient's next-of-kin. The patient's closest living family member is likely the person the patient would probably select – unless the patient and their relative are estranged or in the process of divorce, if the relative is disabled, if the relative is uncooperative, unintelligent, or uninformed, or if the relative disagrees with the patient's life choices.

If the patient lacks next-of-kin, their legal proxy is increasingly remote and the statute's last resort is a clergy member (i.e., staff clergy at the hospital.) The clergy member may never have met the patient, and the CMTA does not take into account the patient's faith and that it may be different from the available clergy, or that the patient may be an atheist or agnostic. Thankfully, the clergy provision of the CMTA is unique among state

DSCS. No other state allows a member of the clergy to provided informed consent for an incapacitated patient.

It is best to avoid the uncertainties of state DSCS by selecting an agent with a Medical Power of Attorney and by executing proper Advance Directives. Doing so will avoid issues surrounding arguing or unreachable next of kin and the need for Guardianship in order to make medical decisions.

MEDICAL POWER OF ATTORNEY

A Medical Power of Attorney, like a Financial Power of Attorney, appoints an Agent to make medical decisions on behalf of the Principal if they become incapacitated. In general, the Agent may be anyone except the Principal's:

- Health Care Provider or their employee UNLESS that provider happens to be the Principal's relative; or,

- Residential Care Provider or their employee UNLESS that provider happens to be the Principal's relative.

A Medical Power of Attorney must be in writing, it cannot be verbal and must be signed. The written Medical Power of Attorney must be delivered to the Agent before it can be used. However, there is no requirement that the original be presented to the doctor.

It should also be included in the Principal's medical record.

Inability to Sign

If a person is physically unable to sign a Medical Power of Attorney (but still mentally competent) then most states allow someone may sign for them at their direction and in their presence.

Electronic or digital signatures may also be valid, depending on your state's laws. Texas law was recently updated to allow for digital signatures, however, the final regulations have not yet been released to implement that change[22].

Agent's Decision-Making Power

An Agent can make any medical decision the Principal could make, but only if the doctor certifies in writing that the Principal is no longer capable of understanding the risks and benefits of a proposed treatment.

When making a decision, the Agent must do what he thinks the Principal would have wanted, and he must consider the Principal's religious leanings. If the

---

[22] Title 2, Subtitle H, Chapter 166, Section 166.011, Texas Health & Safety Code

Principal's wishes are unknown, their Agent will make a decision based on their Principal's best interests.

Even though the Principal may be incapacitated when their Agent takes over, the doctor must legally make a reasonable effort to inform the Principal of any health care decision which the Principal can veto. An Agent cannot place the Principal into an inpatient mental health facility, cannot authorize convulsive or psycho-surgical treatment, cannot authorize abortion, and cannot withhold comfort care.

Conflicts Between Documents

A Guardian takes over from an Agent unless the Judge says otherwise. A person can, however, tell the Judge what they want (by writing it into the Medical Power of Attorney or with a Declaration of Guardian) and their wishes will be given great weight.

If a Directive to Physicians and a Medical Power of Attorney name different Agents, the one signed later in time has priority. If the Directive to Physicians does not appoint an Agent at all, then it takes priority over the Medical Power of Attorney regarding withdrawal or withholding of artificial life support.

On the other hand, if a patient has a Medical Power of Attorney and does not have a Directive to Physicians, state law will control whether the Agent can withhold or withdraw life support. The Texas Act allows your Agent to withhold or withdraw life support systems (and to put you into a hospice program) if necessary.

This power did not exist under the prior law, so always keep legal documents updated.

A medical provider must follow the instructions given by an Agent, unless the provider feels the instructions are contrary to the Principals' wishes, to the law or, to the Medical Power of Attorney's limiting statement. The provider is not liable (under either criminal or civil law) for the result of a decision by an Agent, neither is an Agent liable so long as they undertake their duties in good faith.

Agent Liability for the Principal's Debts

An Agent is not responsible for paying the bill for medical care unless the Agent makes the mistake of taking on liability (READ ABOUT THE *HUSE* CASE FOR MORE ON THIS). Remember, an Agent must inform others that they are acting as an agent, and ***must never sign their own name***.

Example One

I agree to pay whatever charges are incurred for medical care of Fred Smith in this institution.

Fred Smith

Fred Smith, by John Jones as his Agent

RIGHT! John has used his authority as Fred's Agent to sign on Fred's behalf. John is not liable for Fred's medical bill. The patient Fred Smith is bound to pay his medical bill but the Agent John Jones is not bound.

Example Two

> I agree to pay whatever charges are incurred for medical care of Fred Smith in this institution.
>
> *John Jones*
>
> By: John Jones

WRONG! John knows that he is Fred’s agent, and thinks he is being response. Mistakenly, John has signed without expressly indicating that he is acting as Fred’s Agent. The result is John is liable for Fred’s medical bill.

Advance Directives

An Advance Directive is a document instructing doctors, family, and surrogates whether a terminally ill or persistently vegetative patient wants to be kept alive on artificial life support when they are unable to communicate for themselves.

Advance Directives come under many names. In Texas, written instructions in case of permanent incapacity or imminent death are called a “Directive to Physicians, Family or Surrogate”. In Washington, they are called a “Directive to Withhold or Withdraw Life-Sustaining Treatment”. In Colorado, they are called a “Living Will”. All of the documents serve the same purpose: they are a *directive* written in *advance* of incapacity to convey your wishes; an Advance Directive (a “Directive”).

Any competent adult may sign an Advance Directive and when you do so you are called a "Declarant". State laws differ on the particulars, but all Directives share a common core: use a Directive to declare whether life support should be 1) withheld or withdrawn, or 2) applied and sustained. A Directive is more commonly used to instruct withdrawal of life support than to instruct continuation of life support.

Check if your Directive is more than ten years old. If it is, it was likely written under an outdated law. Speak to an attorney about having it updated so you can take full advantage of your state's statute.

Other Conditions

A Directive may impose any other conditions and restrictions the Declarant desires, so long as the condition is not forbidden by law.

For instance, the Texas Act requires that a Directive be suspended if the Declarant is pregnant. In addition, the Texas Act requires that the physician certify in writing that the Declarant's condition is terminal or irreversible, or that death is imminent. A lower standard cannot be set by changing the wording to, for instance, "I want life support withdrawn if my condition is serious". A Directive also cannot direct a physician to perform a mercy killing, lethal injection, or active euthanasia.

Federal Patient Self Determination Act

The passage of the Patient Self Determination Act (the "PSDA") in 1990 revolutionized the use of Advance

Directives throughout the United States. Prior to the PSDA, healthcare facilities were not required to inquire whether an incoming patient had created an advance directive or record the patient's preferences in their medical record. Often patient preferences were ignored.

With the passage of the PDSA, whenever a patient is admitted to or enrolls in a healthcare facility covered by Medicare and Medicaid, including hospitals, hospices, nursing homes, and home health care agencies, the facility must:

- Provide the patient written information concerning the patient's rights under state law to participate in decisions concerning medical care such as the right to refuse medical treatment and the right to an Advance Directive;
- Provide the patient a written statement of its policy regarding implementation of these rights; and,
- Document in their records whether the patient has executed an Advance Directive. Health care providers are not required to provide the documents needed to make Advance Directives.

The PSDA also imposes uniform standards. Covered Agencies:

- Cannot discriminate when providing medical care on the basis of whether a patient has or has not executed an Advance Directive;
- Are required to comply with all state laws regarding Advance Directives. This echoes state laws requiring compliance; and,

- Must provide for staff and community education on issues related to Advance Directives.

When You Need an Advance Directive

A Directive comes into play under limited circumstances. The Declarant must be both unable to communicate and the Declarant's condition must be so poor that life support systems are offered (or recommended) by the physician. This is a very high threshold. The Declarant's condition must be terminal and irreversible or death must be imminent. In addition, the Declarant must be unable to issue verbal instructions. Only then does the Directive come into play, and it is absolutely binding. A doctor cannot force life support on a dying and unconscious Declarant who has a valid Directive.

Verbal instructions from the Declarant always supersede a written Directive. At any time before a Declarant loses the ability to communicate, they can change their mind regarding life support and their other health decisions.

Similarly, a Medical Power of Attorney in many states can contain an instruction to the Agent to refuse any type of medical care for the patient… even if death may result. It is best to have both a Directive and a Medical Power of Attorney to ensure your doctor understands your wishes and you have someone to enforce them if necessary.

No one is required to have a Directive. Creating a Directive must be a personal choice. However, the

downside of not having a Directive is that a patient may be forced to live indefinitely on artificial life support, depleting their financial resources and causing unnecessary stress for their friends, family, and loved ones.

Removal of Life Support by a Surrogate

Under the Texas Advance Directives Act, if a patient has not made a Directive, has no legal Guardian and no Agent under a Medical Power of Attorney, then the doctor and one person from the following list may act as surrogate to authorize removal of life support: 1) the patient's spouse, 2) the patient's reasonably available adult children, 3) the patient's parents, and 4) the patient's nearest living relative.

Further, if the patient does not have a legal Guardian or Agent, and a person listed above is not available, then another physician who is not involved in the treatment of the patient or who represents the facility's ethics committee must concur with the treatment decision. This means that two doctors can withhold life support if no Agent, family or Guardian is available.

Ways to Make a Directive

Formal Written Directive

Most states require that a Directive be in writing. Many states also provide statutory forms that meet minimum legal requirements and specify execution requirements. These forms are often confusing, hard to understand, too long, and provide opportunities to make conflicting

declarations.

State laws do not require the use of statutory forms. A formal attorney-drafted written Directive is the best option to ensure that your wishes are carried out. One example of how a statutory form can cause confusion is the gatekeeper provision in the Texas form.

Self-Directed or Gatekeeper

In Texas, a written Directive can name a proxy to decide whether life support should or should not be withheld. This person is called the Gatekeeper.

Texas's statutory form is misleading. It states:

> "If I do not have a Medical Power of Attorney, and I am unable to make my wishes known, I designate the following person(s) to make treatment decisions with my physician compatible with my personal values: ____________________".

If the blank is left empty, the Directive is a direct communication from the Declarant to their physician. The Directive is directly binding on the physician and leaves no room for confusion.

If the blank is filled in, the Directive delegates the decision to a Gatekeeper who will evaluate the situation for the Declarant and tell the physician whether to maintain or withdraw life support. This method places the decision onto the shoulders of someone else, who probably loves the Declarant very much. and is ill-equipped to make the decision on their behalf.

If you want someone else to make the decision of whether you will receive life support or not, the better approach is to forego making a Directive. Instead, rely on a written Medical Power of Attorney that names an Agent and give your Agent authority to decide whether you will receive life support.

Verbal Directive

Some states, including Texas, allow a competent Declarant can make a verbal Directive. To be valid, a Texas verbal Directive must be spoken in the presence of the attending physician and two witnesses and must be recorded as part of the Declarant's medical records. The Advance Directives Act no longer requires the two witnesses to sign the medical records, but their names must be placed into the Declarant's medical records.

Verbal directives are not recommended. The process is unreliable, and should be used only in the direst of circumstances. The stories of Nancy Cruzan and Terri Schiavo illustrate why a written directive is necessary.

The Nancy Cruzan Matter: No Right to Die

In early 1983, Nancy Beth Cruzan lost control of her car and by the time paramedics arrived she was clinically dead. Despite the lack of vital signs, paramedics were able to restore her heartbeat and respiration.

Physicians, after thorough examination, determined that Nancy had been deprived of oxygen for 12-14 minutes, and had suffered permanent and irreversible brain damage. She remained unconscious, and when

difficulty arose in feeding her, her husband consented to surgical placement of a feeding tube.

It soon became clear that Nancy was not going to recover. Her parents became her court-appointed Guardians and in 1988 asked the hospital to terminate the artificial nutrition. The hospital refused to do so without a court order.

Nancy's parents, as her Guardians, went to the local circuit court for assistance. The court found evidence that Nancy had verbally expressed her wish not be kept alive in a persistent vegetative state. She did not, however, have a written Directive in accord with Missouri law. Even so, the court felt that her right to individual liberty overshadowed the hospital's interest in keeping her alive and the trial court approved withdrawal of artificial nutrition.

Before the feeding tube could be removed, the Supreme Court of Missouri reversed the trial court. The court decided that verbal testimony was not reliable evidence of Nancy's wishes, more convincing evidence was required. More boldly, the court also declared that Missouri had an absolute interest in preserving life that overrode Nancy's individual liberty interest.

‖ *Nancy's case at the U.S. Supreme Court*

Seven years after Nancy fell into a persistent vegetative state, her case was appealed to the U.S. Supreme Court

and granted certiorari[23]. Nancy's family argued that an individual's right to liberty gives them the right to refuse all medical treatment, including artificial nutrition and hydration. Both the State of Missouri and the Federal Government argued that the government has an absolute interest in protecting life, and that when there is no clear and convincing evidence of the patient's wishes then the state has the right to force life-sustaining treatment. In response, Nancy's parents argued that the state has no interest in forced medical treatment; Nancy's right to privacy should allow removal of medical care.

The U.S. Supreme Court handed down a 5-4 decision on June 25, 1990. Chief Justice Rehnquist wrote for the majority. He kept his legal analysis as narrow as possible under the circumstances and relied on the distinction between competence and incompetence foreshadowed by Judge Cardozo in 1914.

Justice Rehnquist acknowledged that a competent person has the right to refuse medical treatment based on the 14th Amendment's declaration that a person's right to "life, liberty, or property" may not be denied without due process of law.

---

[23]Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

This did not answer the question about what should be done for someone who is incompetent.

Justice Rehnquist wrote that a surrogate decision maker is required when a patient is unable to express their wishes. The majority of Justices agreed that it is Constitutional to impose "procedural safeguards to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent" and upheld Missouri's requirement that verbal testimony is insufficient, more convincing evidence is an allowable safeguard.

According to the U.S. Supreme Court, Nancy Cruzan had to stay on life support. Eventually, Nancy's family was able to apply a different provision of state law and went back to court. This time, they showed that they were in compliance with the U.S. Supreme Court's earlier decision, and Nancy was removed from life support in December of 1990.

A Verbal Declaration is Insufficient

The moral of Nancy's story is this: in order to withdraw or withhold life support, a person should make a formal valid written Advance Directive. Anything less is too flimsy and open to challenge.

Consult with a licensed attorney to ensure that your wishes are properly documented in a written Advance Directive so you cannot be forced to remain on life support or to be removed from life support without your consent.

"Living Will" Forms are Invalid in Texas

As a consequence of *Cruzan*, old style living wills are not enforceable in Texas because they do not follow the requirements of the Texas Advance Directives Act.

It is easy to tell the difference between a living will and an Advance Directive. A "living will" says "if there is *no reasonable chance* of my recovery, do not use *heroic measures* to keep me alive". An Advance Directive says "If, in the judgment of my physician, I am suffering with a terminal condition … I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible".

Avoid the outdated "living will" forms and be sure you have a current legal Directive.

The Terri Schiavo Matter: Persistent Vegetative State

In 1990, Theresa Marie Schiavo was living in Florida with her husband when she suffered a medical crisis at the age of 26. She did not have a written Directive and her husband, Michael Schiavo, was appointed Guardian. At his request, a gastrointestinal feeding tube was implanted and she was given rehab and treatment. The doctors later testified that "her cerebral cortex … sustained the most severe of irreparable injuries" and that she was in a persistent vegetative state.

Eight years later, Michael decided that Terri was beyond recovery and petitioned the court to withdraw the

feeding tube. He felt strongly that she had expressed a choice to avoid life support when she was healthy. Terri's parents, Bob and Mary Schindler, felt strongly that she should be kept on life support. Terri did not make an Advance Directive so her voice could not be heard.

The matter was brought to court. In February of 2000, the trial court determined that Terri would have refused to be on artificial life support. Over a year later, in April of 2001, the Florida 2nd District Court of Appeals affirmed and the Florida Supreme Court and The U.S. Supreme Court denied review of the matter. Terri should be allowed to die.

On April 24, 2001, Terri's feeding tube was removed. Before she could die the Schindlers raised new issues which were upheld by the appeals court life support was reinstated. A new trial was held which again found that found that life support should be removed. The appeals court upheld the decision and The Florida Supreme Court again denied review. Again, the courts agreed that Terri should be allowed to die and in late 2003 the Judge ordered the feeding tube removed.

On October 15, 2003, Terri's feeding tube was removed for the second time. Six days later, Florida Governor Jeb Bush signed "Terri's Law" and ordered the doctors to reinsert the feeding tube.

Michael took the state to court, and in September 2004 the Florida Supreme Court ruled that Terri's Law was unconstitutional and in violation of "the fundamental Constitutional tenet of separation of powers" between

the executive, legislative and judicial branches. In January 2005, the U.S. Supreme Court declined to hear an appeal.

Several more hearings were then held on various claims raised by the Schindlers, and each claim was ruled groundless. In March 2005, the Schindlers went to federal court a second time but the Judge ruled that he had no jurisdiction over the matter.

Within days, the U.S. Congress and President Bush passed a bill called the “Palm Sunday Compromise” or “Terri’s Law II” specifically authorizing the Schindlers to sue in federal court. The federal district court heard the matter quickly and determined that the prior court actions were appropriate. The 11th Circuit affirmed, and the U.S. Supreme Court denied review.

Terri’s feeding tube was finally removed for the last time, and she died a few days later on March 31, 2005. The autopsy revealed that Terri had severe, irreversible brain damage and that her brain was discolored, scarred and shriveled to half its normal size.

║ *A Cautionary Tale and a Call to Action*

Terri was turned into a national symbol of the fight for the right to die without regard to her personal dignity or wishes.

You have the legal right to make your own medical choices, whether that means withholding life support or continuing life support indefinitely. Terri had that right but did not exercise it by signing an Advance Directive

to make her choice obvious and enforceable. Your task is to make your own choice and to document it legally so that your choice regarding life support will be enforced.

Do Not Resuscitate Order

A Do Not Resuscitate order (DNR) is a particular type of Advance Directive that instructs healthcare providers in general, and emergency medical service (EMS) personnel in particular, whether to resuscitate the Declarant and provide life sustaining treatment if they suffer a medical emergency such as cardiopulmonary arrest that causes cessation of vital functions. Generally, DNR orders are only used by people who are seriously ill or frail, however this is not a requirement. Any adult person has the right to choose for themselves whether they want to receive medical car. A DNR order may also be called Physician Orders for Life-Sustaining Treatment, Medical Orders for Life-Sustaining Treatment, or a Cardiopulmonary Resuscitation Directive.

Nancy Cruzan would have been well served by a DNR order. Emergency medical personnel would have known not to resuscitate her when they arrived at the scene of her collision and found her dead. If she had not been resuscitated, she would not have been admitted to the hospital and given life support, and her parents would not have needed to fight a lengthy court battle with the State of Missouri to uphold her right to die.

DNR orders come in two distinct varieties: 1) inpatient and 2) out-of-hospital. An inpatient DNR is used when a patient suffers a medical emergency while being treated in a hospital. Out-of-hospital DNRs ("OOH-DNR") are used outside of the hospital, such as in nursing homes, assisted living facilities, hospices, in emergency rooms, in private residences, and in public places.

Any competent adult is empowered to create a DNR order regardless of their current health status. If the Declarant is unable to sign for themselves, most states, including Texas, Washington State, and Colorado, allow their representative (their Agent, Guardian, or qualified family member) to sign on their behalf. A DNR order must also be signed by the attending physician, and may or may not require witnessing depending on state law. There is no reason to not create a DNR order.

Consult your doctor and your attorney if you are interested in a DNR order. Your state may have different laws for inpatient and out-of-hospital DNR orders. It is essential to have a DNR order, an Advance Directive, and a Medical Power of Attorney to ensure that you receive the treatment you want and that your directions will be obeyed.

Do Not Resuscitate Order Jewelry

A DNR order bracelet or necklace informs healthcare personnel that the patient has a valid DNR order. DNR identification jewelry is not required, but like a diabetes bracelet or penicillin allergy bracelet, it provides harried EMS personnel an easy way to determine the patient's

medical status and wishes. In most states, DNR jewelry creates a presumption that the patient has a valid DNR order even if the order itself is not present.

Your physician can direct you to a company that makes DNR jewelry valid in your state.

DNR Order for a Minor Child

A DNR order for a minor child can be authorized by their legal surrogate. Anyone who could make a healthcare decision for the child in normal circumstances may act as their legal surrogate for a DNR order such as the child's parents, their legal Guardian, or their managing conservator (a court appointed individual when the parents are divorced).

Texas Laws on Out-of-Hospital DNR Orders

The Texas Advance Directives Act controls OOH-DNR orders for Texas residents. The OOH-DNR form was written by the Texas Department of State Health Services. Do not change the Texas form. Anything but the official form is legally invalid and unenforceable. Electronic or digital signatures are also legal, but regulations have not been released to implement the law, so the process is still unavailable.

The attending physician must sign an OOH-DNR. It authorizes the caregiver "not to initiate or continue" the following treatments:

- Cardiopulmonary resuscitation;
- Endotracheal intubation or other means of advanced airway management;

- Artificial ventilation;
- Defibrillation;
- Transcutaneous cardiac pacing;
- The administration of cardiac resuscitation medications; and,
- Other life-sustaining procedures specified by the Texas Board of Health.

The statute does not include authorization to withhold palliative care: medical interventions or therapies considered necessary to provide comfort care or to alleviate pain or to provide water or nutrition. However, the patient's surrogate can (under a valid Medical Power of Attorney) give instructions to withhold artificial nutrition and hydration.

If the patient has signed an Advance Directive, the law presumes that they want an OOH-DNR if they are incompetent and cannot express their preference. In this event, the attending physician will sign for the patient.

If the patient is awake, aware and competent, then Texas law allows them to issue an oral OOH-DNR. The statement must be made in the presence of the doctor and two qualified witnesses. In this event, the doctor and the witnesses must sign the OOH-DNR form for the patient.

If EMS is called to the scene, they can withhold resuscitation when an OOH-DNR or approved DNR identification jewelry is presented. However, EMS must verify:

- The identity of the patient. As such, the caregiver should have some type of photo ID for the patient ready to show; and
- The paperwork is correct. It must be signed, dated, and all the blanks must be completed. If the paperwork is not correct, the EMS technician can ignore the OOH-DNR.

Advance Directive Revocation by a Guardian

An Advance Directive can be revoked by the Declarant at any time. The mental state or competence of the Declarant is not an issue. Revocation can be accomplished formally through a new written Directive or through destruction of the original Directive which may be done by the Declarant or by a person in the Declarant's presence under their direction. It may be a crime to conceal or to damage the Directive of another person without their consent.

An oral or written revocation is legally effective only if the physician is notified. The physician must record the time and day when the written or oral revocation was received and must write the word "void" on each page of the Directive in the medical records.

Institutional Policies

No individual health care provider is obligated to participate in withholding life support if they object to doing so. Most health care institutions develop and

maintain clear and precise written policies regarding the implementation of Advance Directives.

In Texas, the Advance Directives Act requires a health care facility to provide all incoming patients written notice of policies when they (1) are admitted to receive services from the facility; or (2) begin receiving care from the facility (whichever is sooner). If they are not competent, the facility must give notice to the patient's representative, in the following order:

- The patient's Guardian;
- The person responsible for the patient's health care decisions (like your Agent under a Medical Power of Attorney);
- The patient's spouse;
- One of the patient's adult children;
- One of the patient's parents; or,
- The person who admitted the patient to the facility.

The facility must do a "diligent" search to locate the patient's representative. If they still cannot locate a representative, the facility is not required to provide notice.

Review your preferred health care facility's policies to ensure they conform with your personal choices.

Physician Liability for Compliance and Noncompliance

A physician, nurse, or health care facility who complies with an Advance Directive is immune from liability

unless they act negligently. Compliance does not create any criminal liability and is professional conduct, so it does not violate licensing requirements.

A health care provider is not liable for failing to act in accord with a Directive they do not know about.

However, if a health care provider is aware of a Directive yet refuses to comply with its terms, they may be subject to civil and criminal liability as well as professional review and disciplinary action by the appropriate licensing body.

A Directive is useless if your doctor does not know about it. Have a copy handy in case you go into the hospital Family members who are likely to be nearby during time of crisis should also have a copy. The federal Patient Self Determination Act requires all hospitals to you if you have a Directive.

DEATH WITH DIGNITY

Until very recently, all terminally ill patients were forced to live out their natural lives. Without drastic action, they could not choose when and how they wanted to die. In the last two decades, a small number of states have recognized, in a brave move of great compassion and empathy, that a competent yet terminally ill person should have the right to end the deterioration and take the end of their life into their own hands. This practice is called Death with Dignity.

Death with dignity (DwD) is highly regulated and must be specifically authorized by state statue or court ruling. As of July 9, 2016, only four states (Oregon[24], Washington[25], California[26], and Vermont[27]) have statutes allowing DwD. In addition, Montana allows DwD under a court ruling called *Baxter v. Montana*[28] in which the Montana Supreme Court ruled that DwD was required under the Montana Constitution.

Conversely, the New Mexico Supreme Court ruled in June 2016 that there is no fundamental right to physician-assisted death with dignity under its state constitution. Much like Texas, New Mexico has a statute[29] making it a crime to aid a person in the taking of their own life. A cancer patient and two physicians sued to have the law ruled unconstitutional. The trial

---

[24] The Oregon Death with Dignity Act (1994).

[25] The Washington Death with Dignity Act (2008).

[26] The End of Life Option Act (2016).

[27] The Patient Choice and Control at End of Life Act (2013).

[28] Baxter v. Montana, Mont. Sup. Ct., 2009 MT 449, 354 Mont. 234, 224 P.3d 1211 (2009).

[29] N.M.S.A. § 30-2-4

court did so rule, but was reversed by the court of appeals. The New Mexico Supreme Court upheld the reversal[30], saying that while the state "does not have a legitimate interest in preserving a painful and debilitating life that will imminently come to an end, [it] does have a legitimate interest in providing positive protections to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe." In other words, only if the people demand a new law and the legislature changes the statute will death with dignity become legal in New Mexico.

Death with dignity allows you to choose the welfare of your family and your own dignity over fattening the purses of nursing facilities and healthcare providers. The choice, freely made, is a loving, generous gift to self and family.

State DwD laws exempt licensed physicians and pharmacists from civil or criminal liability when they dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient in compliance with the

[30] Morris v. Brandenburg, 2016 N.M. Lexis 151 (N.M. June 30, 2016)

law. Doctors in Montana do not have the same clear liability shield as doctors in the other four states.

DwD laws have face a constant uphill battle. After the Oregon Death with Dignity Act passed, it was immediately challenged. In 1997, the U.S. Supreme Court declined to review the case, which allowed the law to go into effect and Oregon's citizens voted to keep the statute. That same year, the U.S. Supreme Court heard the case of *Vacco v. Quill*[31] and decided that there was no Constitutional right to assisted suicide, but that the states are free to determine their own policies on the issue.

This was not the end of the story for the Oregon law. Several efforts in Congress (led, in part, by then Senator John Ashcroft) to overrule Oregon were defeated. Shortly after becoming U.S. Attorney General, Ashcroft announced a change in federal policy under the U.S. Controlled Substances Act (CSA). Attorney General Ashcroft reinterpreted the CSA and declared that the use of controlled substances to assist suicide was not a legitimate medical practice and that dispensing or prescribing them for this purpose was unlawful under the CSA. The new policy raised concerns on two fronts: 1) in Oregon it would cause assisted suicide to cease, and 2) in all the States, doctors would fear criminal

[31] Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834, 65 USLW 4695 (1997).

prosecution for aggressively prescribing pain medications.

The State of Oregon, an Oregon physician, an Oregon pharmacist and some terminally ill Oregon residents sued Ashcroft to reverse this policy. In 2002, the trial Judge ruled against Ashcroft. He appealed and in 2004, the federal court of appeals also ruled against Ashcroft, holding that his policy "violates the plain language of the CSA, contravenes Congress' express legislative intent, and oversteps the bounds of the Attorney General's statutory authority".

In October 2005, the U.S. Supreme Court issued a ruling against the Ashcroft policy and held that the CSA does not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide when a state law authorizes the practice[32].

‖ *Procedural Hurdles for Death with Dignity*

Death with dignity laws are a huge step forward in recognizing the right to die, but they are not perfect. In order to take advantage of them, a patient and their doctors must overcome a number of procedural hurdles. The prerequisites require intricate attention.

---

[32] Gonzales, Attorney General, et al. v. Oregon et al., No. 04-623, 2006.

> The daughter of one of our Washington clients who chose Death with Dignity said, “It was hard to watch my dad wither. With the help of the legal professional who could navigate the law requirements of Washington State, Death with Dignity was a gift my father gave to himself, and to my mother, me and to his grandchildren. His body was no longer functioning on its own. The vital, strong man was already gone. He watched as his body deteriorated to the point where he could no longer walk, toilet himself, dress himself, or even hold the phone for his conversations. He was still breathing, and his heart was still beating, and his brain was still working, but when he fell at home and was unable to right himself from the bathroom floor he moved to a nursing home. They helped feed him, toileted him, bathed him, gave him his meds, but his dignity was gone.
>
> He was 85 years old. He had lived an independent, fruitful, full and interesting life. He was withering and slowly dying, without hope of any quality of life. Because he lived in Washington State, Death with Dignity allowed him to be in charge of this part of his life when the rest of his life was out of his control.”

The Washington Death with Dignity Act is an excellent example of these procedural requirements. In order to qualify for Death with Dignity, a patient must:

- Be a resident of a state that allows Death with Dignity. The patient needs to show proof of residency, which can be Washington issued identification, registration to vote in Washington, or evidence that the patient owns property in

Washington. Other proof of residency may serve; the statute is not exhaustive;

- Be competent and able to communicate. A patient in a persistent vegetative state or who is no longer competent, such as if they have advanced dementia, cannot choose Death with Dignity;
- Locate two doctors willing to assist the patient with Death with Dignity: an attending physician and a consulting physician. The attending physician should be a doctor who knows the patient, their diagnosis, and their prognosis and is willing to spend the time necessary to make sure the patient is fully informed and acting voluntarily. The attending physician is responsible for writing the prescription. The consulting physician must confirm the attending physician's diagnosis and prognosis and verify that the patient is competent, acting voluntarily, and has made an informed decision;
- Make an initial oral request to the attending physician for medication;
- Make a voluntary written request for medication, signed, dated and witnessed, to the attending physician. The written request can be made immediately after the initial request, but there is a minimum 48 hour waiting period after the written request and when the attending physician can prescribe the medication;
- Orally reiterate the initial request no less than fifteen days after making the written request. A patient can rescind their oral or written request at any time;

- Obtain an official determination from both the attending physician and the consulting physician that the patient is terminally ill with a disease that is incurable and irreversible and that will, within the doctor's judgment, cause the patient to die within six months. The terminal condition cannot be the sole result of advanced age;
- Attend counseling if the attending or consulting physician believes the patient requires psychiatric or psychological assistance.

Only after fulfilling all of these criteria can a patient obtain the medication from a licensed pharmacist. Once they have it, they have no obligation to use it. The medication can sit in the patient's refrigerator for years until they are ready. Once the patient is ready, they must self-administer the medication without the assistance of family, friends, or a healthcare professional. A loved one is allowed to prepare the medication. Generally, it is mixed with an alcoholic drink, but the patient must ingest the medication to end their own life in a humane and dignified manner without assistance.

If you are in a state that allows Death with Dignity and have fallen victim to a terminal disease, still have your mental faculties, but do not want to suffer in indignity while watching your life savings disappear, you can talk with an experienced lawyer to help you navigate the law to accomplish Death with Dignity.

Death with Dignity and Insurance

Death with dignity is not suicide. A person who chooses death with dignity is considered to have died from natural causes. Insurance companies are barred by law from taking into account a patient's choice to die with dignity when selling, issuing, and paying on insurance and annuity policies.

Physician Assisted Suicide in Texas

Texas does not yet recognize the Death with Dignity movement. The Texas Advance Directives Act "does not condone, authorize, or approve mercy killing or permit an affirmative or deliberate act or omission to end life except to permit the natural process of dying…" Texas law does, however, allow withholding or withdrawing life support under a Directive to Physicians, honoring a do-not-resuscitate order, and declining to receive medical treatments even though that choice may result in death.

The difference between this and Death with Dignity is passive withdrawal of support versus active intervention to hasten death. It is legal in Texas to avoid or refuse medical interventions so that nature takes its course. It is illegal in Texas to use medical interventions to bring death sooner than it would have naturally occurred.

MEDICAL CONFIDENTIALITY: HIPAA AND STATE LAW

The Health Insurance Portability and Accountability Act (HIPAA) was passed by Congress in 1996. It took another seven years, in April 2003, for the Federal Government to issue regulations and standards for enforcing the law.

HIPAA gave everyone the right to control their "health information and sets rules and limits on who can look at and receive…. health information.[33]" HIPAA was written with good intentions, but the result has been paperwork people wish they could avoid. By now, almost everyone has seen and has signed a HIPAA compliance statement… repeatedly… at every healthcare provider they visit.

Medical providers are careful to have patients sign compliance statements. The regulations say a medical provider can be fined $100 per violation, up to $25,000 per year. That is enough to motivate every doctor's office and hospital to comply with the law in the most obvious way: to clam up about personal health information.

[33] http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html

HIPAA forbids doctors from discussing private medical information with an unauthorized person. There are some automatic exceptions. For instance, "personally identifiable health information" can still be disclosed, if necessary to collect payment for services (like a statement to Medicare), to comply with abuse or neglect laws, for law enforcement purposes, for public health reasons, or if ordered by a court. The law also automatically allows an Agent in a Medical Power of Attorney (or anyone else closely involved in your medical decision-making) to obtain medical information – but restricts disclosure until after the patient is incapacitated and unable to make their own decisions.

It is prudent to specifically authorize disclosure to the Agent of otherwise confidential medical information under HIPAA *even while the patient has full capacity to make decisions.* A standard Medical Power of Attorney, without modification, only authorizes disclosure of confidential medical information to the Agent *after the patient is incapacitated*. Your Agent is a person you have chosen and you trust. They should have access to medical information as soon as your Agent requires access. That way, your Agent will not be relegated to the sidelines and they will be well-informed and able to act on your behalf when necessary.

Copies of Medical Records

The Texas Occupations Code[34] specifically authorizes patients to obtain copies of their medical records. If the patient is too ill to make the request, an Agent appointed via Medical Power of Attorney can request, review and receive medical and hospital records[35]. A patient can either ask for a copy for their own use, or ask that a copy be supplied to another doctor, a lawyer, or to another person of their choosing. If they are too ill to request the records, then an Agent appointed in their Medical Power of Attorney (with proper HIPAA authorization) has legal authority to request, review and receive medical or hospital records.

Request to Release Medical Records

A doctor must release copies of a patient's medical records when they submit a written request. The written request must tell the doctor exactly which records are desired, must give a reason for the release, and must identify the person to whom the information is to be given.

Send the written request by certified mail or hand deliver it to the doctor's office to ensure the doctor

---

[34] Texas Occupations Code, Title 3, Subtitle B, Chapter 159

[35] Title 2, Subtitle H, Chapter 166, Section 166.157, Texas Health & Safety Code

receives it. The doctor does not have to honor an oral request, but must honor a written request within fifteen days of receipt. The only valid reason the doctor may have for refusing to release records is if the doctor determines that access to the information would be harmful to the patient's physical, mental, or emotional health.

A doctor can legally charge a reasonable fee for copies of a medical record. According to the Texas Board of Medical Examiners' rules, the doctor can charge a "reasonable cost-based fee," which the Board sets as "no more than $25 for the first twenty pages and 50¢ per page for every copy thereafter". Copies of films (x-rays) or other static diagnostic imaging studies (MRIs) can cost up to $8 per copy. The doctor can legally require that costs be paid prior to release of the information.

The information contained in medical records must be released at your request, but the original file belongs to the doctor. Copies allow a patient to have their information, while allowing the originating doctor to keep the original. Most doctors want to keep records on their patients to protect themselves if a patient decides to sue the doctor at some future date.

Here are some tips to follow when you need to request copies of medical records from your physician:

- Submit your request in writing along with a check for the fee the doctor's office requests. To get an estimate of the fee, start with a phone call to the doctor's office;

- Remember to provide a complete address and zip code for the location where you wish to have the records sent;
- Remember to provide your former name as it appeared in your medical records if you have married, divorced, or otherwise changed your name;
- If your name is fairly common ("Mary Smith" appears in the Houston phone book more than 70 times) then include with your request your date of birth or other ID to ensure proper recognition.

Anatomical Gifts

An anatomical gift is a way to donate useful organs or tissues after death. There are four ways to legally make an anatomical gift:

1) A Last Will and Testament;
2) A written declaration of anatomical gift;
3) A statement on a driver's license; and,
4) The online organ donor registry.

While all four of these methods are legal, the method you select must be sensitive to the speed requirements of donation. Any lengthy delay complicates an organ or tissue donation and may render the organ or tissue unusable. Hence, avoid using your Last Will and Testament because it could be days or weeks before anyone sees your statement. In the interest of speed, it is much better to carry a document on your person and register with the state as a donor.

State Organ Donor Registries

Every state maintains an independent organ donor registry with different policies, procedures, and requirements in accord with that state's laws. The U.S. Department of Health & Human Services maintains a website at WWW.ORGANDONOR.GOV with information and links to each individual registry.

The Texas Organ Donor Registry

The Texas online registry began a few years ago as the "Donor Education, Awareness and Registry" (DEAR) program. It has since been renamed as the "Glenda Dawson Donate Life – Texas Registry" (after a Texas legislator who received an organ transplant). Read their materials and register by visiting:

HTTP://WWW.DONATELIFETEXAS.ORG

If you decide to register as an organ donor, fill out the registration form on your computer and sign the form electronically. The registry then allows you to download a donor certificate to carry and identify yourself as a donor. Anyone of any age can register as a donor, but children under the age of eighteen must have legal consent from a parent or Guardian.

The law that authorizes the registry also says that if you change your mind about being a donor and want to have your name deleted from the state registry, you must provide written notice directing that your name should be deleted. The website allows you to log in to an

account set up just for you to make any changes that you desire.

Willed Body Programs: Medical School Donation

Anatomical gifts are different from "donating a body to science". Donation of a whole body requires a specific process outlined by a particular medical school.

Contact your local medical school and they will send you a "Body Bequeathal Agreement" to fill out, sign, and return. The Agreement is another type of anatomical gift declaration, and is authorized by the Texas Anatomical Gift Act.

After you return the form to the medical school, they will enter you in their records. They will also send a copy of the form back to you. Keep it with your other important papers, and make a photocopy to put in your car. Give a copy to the person who will handle your affairs when you die.

The willed body programs also provide bodies to the Texas State Board of Morticians for funerary students to learn their art.

The medical school usually covers the cost of transporting the body to their facility. After their scientific study is complete (usually in six months to two years) the body will be cremated. The ashes can be returned to the family if the family so desires.

PART 5: Living Trusts

A trust is a legally binding agreement to manage assets. There are a multitude of different kinds of trusts, each with its own purpose and particular tax benefits, entire books can and have been written solely on trusts.

One type, a Living Trust or “Inter-vivos Trust”, is established to help a person during their lifetime and then help others after they die. The other general type of trust is called a Testamentary Trust. A Testamentary Trust is described in a person’s Will and is established only after the person dies; it benefits the deceased’s heirs and does not assist the creator during their lifetime.

A Living Trust can serve many purposes. It eases the distribution of the trust Grantor’s estate (the Grantor is the creator of the trust). It can entirely circumvent the need for probate. It provides unique asset management opportunities that benefit the Grantor while they are living and that benefit the Grantor’s heirs after the Grantor dies. It takes care of the Grantor and anyone specified by the Grantor if they become incapacitated or disabled. It directs how the Grantor’s assets must be used. It can, just as with a proper Will, include legal methods to avoid or eliminate estate taxes.

A Living Trust is typically revocable and amendable during the Grantor’s lifetime. If the Grantor so instructs,

a Living Trust can be non-amendable, and can be irrevocable. If an irrevocable Living Trust is established, the terms cannot be changed until the trust runs its course. Revocability means that if the Living Trust at some point stops serving the purposes for which it was created or the purpose needs to be updated, it can be revised or revoked by the Grantor as needed. As new people and new circumstances enter the Grantor's life, the Living Trust can be amended to change the terms of the trust, change the Trustee, or add new beneficiaries (such as new children, grandchildren, or romantic partners).

Establishing and Understanding Living Trusts

A Living Trust is created by signing and funding a carefully drafted trust agreement. The agreement specifies who will fulfill each role in the trust, the purpose of the trust, the lifetime of the trust and when it will end, and what will happen to the trust corpus when the trust terminates.

Living Trust Roles

A Living Trust has three essential roles or positions, all of which must be filled in order to create the trust:

- The "Grantor" establishes the Living Trust, provides assets to the Living Trust (called the trust "corpus"), and determines the terms and purpose of the Living

Trust. The Grantor can revoke or amend a Living Trust, unless the trust is irrevocable.
- The "Trustee" manages the Living Trust and its assets on a day-to-day basis. The Grantor selects a Trustee (typically, themselves) who acts as legal owner and manager of the trust corpus.
- The "Beneficiary" receives the Living Trust's bounty, they are entitled to use and enjoy the trust corpus. A typical Living Trust names the Grantor or grantors as initial beneficiaries. When a Grantor names them self as beneficiary, they continue to have access to use and enjoy the trust corpus (like their home, car, and bank accounts). A Grantor should also name successor beneficiaries, typically the Grantor's heirs, to receive the benefit of the trust after the initial beneficiaries die.

Funding

A well written and functional Living Trust must be funded. Funding means the transfer of ownership of some or all of the Grantor's assets into the trust. A trust can only manage the things it owns. Assets in a trust are commonly referred to as the trust "corpus" from the Latin word for "body". Without a body the trust cannot function. Generally, a Living Trust is funded shortly after the trust agreement is signed.

It is not legally necessary to fully fund a Living Trust when it is established. A trust that is not fully funded when it is established is called an "unfunded" Living Trust (though it must own *something*, like a small bank account, a ten-dollar bill, or a particularly valuable or

notable rock). An unfunded Living Trust, however, requires that the Grantor create a strategy to move the rest of their assets into trust in the future. This is usually done with a Durable Power of Attorney. Here is an example of how it works:

> Hillary establishes an unfunded Living Trust and deposits $100 into a new bank account under the trust's name. At the same time, she creates a Durable Power of Attorney, authorizing her Agent to transfer her estate into the Living Trust if she becomes ill. She must rely upon her Agent to follow instructions, and they must act quickly if she becomes seriously ill because their authority ceases when she dies.
>
> If her Agent acts slowly, or her death is rapid, they may not have enough time to transfer the Grantor's assets into the Living Trust. All financial powers of attorney legally terminate when the principal dies. Further, an unfunded Living Trust will not keep the Grantor's estate out of probate. Probate is necessary if the Grantor owns their assets when they die. If the Grantor dies unexpectedly or quickly, an unfunded Living Trust cannot provide the benefit it was created to provide, it was meaningless and wasteful.

Funding a Living Trust requires the Grantor to take different steps depending on the type of asset. For example:

- Bank accounts must be retitled as being owned by the trust. This is accomplished when the Grantor and Trustee visit the bank, provide a copy of the trust agreement, and sign a new signature card (account agreement). Often,

account numbers are left unchanged as only the account name and signers are modified.

- Real estate must be retitled to the trust. Generally, the same attorney who wrote the trust will prepare a new deed conveying land title to the trust. Each deed must be recorded with its county clerk. Further, the local tax assessor's office should be informed so that they can modify the tax account. Also, the casualty insurance should be modified to name the trust as an additional insured.
- Automobiles and other titled vehicles should be retitled to the trust. The Grantor and Trustee should visit the government office at which auto titles are processed to complete the proper documentation.
- Stocks and bonds should be reissued in the name of the trust. Ideally, the Grantor will have a brokerage account that can hold all of these investments, and when the account is assigned to the trust then all the investments in the account are automatically assigned as well.

Certain types of assets, such as a 401(k) and an Individual Retirement Account (IRA) or a life insurance policy, are already non-testamentary. Most often, ownership of these should not be transferred into the Living Trust. Instead, the Grantor should designate the trust as beneficiary of the account or policy.

The Purposes of a Living Trust

Living Trusts are highly flexible and can be established to serve many different purposes. This chapter will primarily discuss Fully Funded Living Trusts, a revocable trust designed to manage all of the Grantor's assets while the Grantor is alive and pass those assets according to the terms of the trust after the Grantor dies. A trust can be used to avoid probate, save estate taxes if the Grantor's estate would be subject to estate taxes, manage the Grantor's assets while they are well and if they become disabled, and assist and provide for the Grantor's loved ones. For context, it is important to briefly discuss other additional purposes for Living Trusts which display their flexibility and power.

Mineral Trust

Mineral rights holders in an area where natural gas is being extracted with horizontal drilling and hydraulic fracturing ("fracking") should be concerned about potential liabilities. The daily operations of fracking are handled by the oil company, but the land owner may be exposed to liability. Liability may arise from environmental damage resulting from the fracking, another is damage from seismic activity. Any allegation of damages in a lawsuit will force the landowner to defend themselves. Erect a legal shield that is as strong as possible.

Insurance is, of course, a basic necessity. As homeowners insure their home against fire, the landowner should have a broad general liability policy

covering risks related to their land. All policies have their limits, however, and there are some risks that are not covered. Go beyond insurance when building your defenses.

One strategy combines a Limited Liability Company which is owned by a Living Trust. The landowner severs the surface rights from the mineral rights and transfers the mineral rights into the LLC. The LLC shields the rest of the landowner's estate from liabilities arising from the mineral rights. The LLC is owned by the trust, which is controlled and owned by you, so you still ultimately control and benefit from the mineral rights, with better protection.

If there is damage from fracking and the landowner is held liable, the owners' assets may be lost in the judgment. If the only legal owner is the LLC, then only the mineral rights can be lost in a judgment. Anything not owned by the LLC cannot be lost in a lawsuit against the LLC. This also protects any royalties that were paid to the LLC and already distributed to the trust. The royalties are no longer assets of the LLC and therefore cannot be included in a judgment against the LLC.

Forming an LLC and a Living Trust is complex, but the benefits can be extensive. As with all legal planning there are details which will be specific to your personal situation and there are always pros and cons to be weighed. Consult with a qualified estate planning and business formation law firm to see if this strategy is appropriate to limit your exposure to liability.

Investment Trust

A Living Trust can be used to segregate investments the Grantor wants to distribute and manage in a special manner.

For example:

> Auri and Max have been husband and wife for ten years when Auri's mother Zuul dies. Auri inherits stocks from her parents which she desires separate from general marital property. Max is her second husband and she wants to ensure that the inherited stocks pass only to her children, not to Max or his children.

A Living Trust can segregate the assets, allow them to retain their separate property character (if Auri and Max live in a community property state), and can direct what will happen to the stocks after Auri dies.

Educational Trust

A Living Trust can be used to provide for educational expenses for family members. Perhaps grandparents desire to set money aside for the college education of the grandchildren. While this can be done via a 529 plan, a Living Trust allows the grandparent more control over the funds (though potentially fewer income tax benefits).

A special irrevocable trust educational expenses is also an option. Gifts to an irrevocable Living Trust remove the gifted assets from the Grantor's estate and vest ownership in the beneficiaries. Tax rules may require

that special provisions be included, called a power of 5 and 5. See the discussion below about CRUMMEY TRUSTS for more on this.

Asset Co-Ownership Trust

There are various non-marital relationships in which property co-ownership may be desirable. For instance, long-time roommates who pool their resources to purchase a house together, or parents who help their adult children purchase their first home.

A Living Trust can be the owner of that shared resource. The trust will clarify who controls the resource, how use and enjoyment will be shared, how expenses will be apportioned, what happens if the relationship changes, how funds will be split if the resource is sold, and what happens if a Grantor dies.

Non-Testamentary Transfers: Avoid Probate

In order to take full advantage of a Living Trust's ability to avoid probate, the Grantor must fully fund the trust. If they do not, some of the Grantor's assets will not be controlled by the trust. Probate may still be needed for any assets not in trust when the Grantor dies. For this reason, a Living Trust should always be paired with a well drafted Last Will and Testament to dispose of incidental and personal items, or other assets not placed in trust.

A Living Trust also provides privacy to the Grantor and the Grantor's heirs. A Living Trust does not enter the public record like a Will upon probate. There is no legal

requirement that a copy of the Living Trust be delivered to each of the beneficiaries (unlike a Will, which when probated must be provided to each heir in an official notice of the probate).

A funded Living Trust is a particularly effective way to avoid the confusion that results when a person owns real estate in more than one state. Typically, when a person who owns property in more than one state dies, their Will must be presented for probate in each state where they owned property. If the real estate is not part of the deceased's testamentary estate (that is, it passes through the terms of a Living Trust instead of the terms of their Will) the probate process is significantly more straightforward and their Will need only be presented in their home state.

Remember to make your decision on whether to use a Living Trust or a Will to pass your estate based on unbiased input. Some attorneys and insurance agents offer free seminars. Often they have only one goal: to sell you a Living Trust. They do not care about the legal alternatives that may be more suited to your needs. They will not give you a valid comparison. Seek balanced advice by going directly to a professional who will act as your fiduciary.

Estate Tax Benefits

A Living Trust can include specific provisions to reduce or eliminate federal estate taxes. Read this book's Part on ESTATE TAXES for many more details, but in summary:

- Estate taxes are due only when a single estate exceeds $5.45 million in value (in 2016). Married couples double that exemption through use of portability (which requires filing a federal estate tax return) or a Bypass Trust. Some attorneys feel that a Bypass Trust offers better flexibility and control.

- A Living Trust is not the only way to take advantage of tax savings (Bypass Trusts can also be structured as Testamentary Trusts inside a Will). However, a Living Trust is the only way to use a Bypass Trust and avoid probate of the associated assets.

Asset Management

The Grantor of a Living Trust is typically its beneficiary and its Trustee as long as possible. This arrangement is not mandatory; someone else can serve as Trustee in case the Grantor needs help or wants to delegate authority.

Perhaps the day will come when you feel you need assistance in managing your assets. Perhaps your spouse has died, leaving you alone and in charge for the first time. Perhaps you have been informed of an illness, and want to plan an orderly transition. Or perhaps you are retiring and plan to travel for most of the year, and you need someone at home to guard the nest egg and to pay your routine expenses.

If the Grantor desires it, an alternate Trustee can manage the trust's assets. That Trustee would pay the

beneficiary's bills, balance the bank accounts, renew CDs, make investment decisions, and be sure that the beneficiary's needs for food, shelter, clothing, transportation, medical care, entertainment and support are satisfied.

In this way, if you are disabled or if you just want help, your Living Trust continues to protect you and your assets. As its Beneficiary, you remain entitled to all of the income generated by the Living Trust, and remain entitled to benefit from the Living Trust corpus.

Provide for Loved Ones

A Living Trust is highly flexible, it allows the Grantor to provide benefits to their loved ones during their lifetime and after their death. A Living Trust can mimic a Will; it can contain instructions for the distribution of the Grantor's assets after their death.

For example:

> Jack and Beverly have been married 48 years. Jack has always handled the family finances, but he has not been doing so well lately. The doctor fears Alzheimer's disease may be slowly disabling Jack.
>
> Jack and Beverly decide to set up a Living Trust and to transfer their home, certificates of deposit, stock, savings, and cars to the trust. They select their son Wesley to act as Trustee. Their goal: to be sure that Jack's illness does not reduce their income or ruin their reputation. Additionally, they want Beverly to be cared for as long as she lives, and they want their granddaughter's college education to be encouraged.

As Trustee of the Living Trust, Wesley can invest the assets conservatively to protect the principal and to generate income. He will then apply the income to pay Jack's medical bills and Beverly's living expenses.

As Jack becomes less capable, the trust ensures that their assets are not frozen. Wesley continues to act as Trustee without interruption. If Jack was still in charge, bills would be left unpaid and investments left unattended. Beverly would be in real trouble, especially if Jack's signature was required. She might be unable to access their savings, and be forced to start Guardianship proceedings over Jack. The Living Trust has made these difficulties vanish.

After several years pass, Jack dies. There is no probate, all their assets are titled to the Living Trust. The Living Trust continues for Beverly's benefit. Her period of mourning and depression has no effect on her finances, Wesley is still managing the Trust.

When Beverly dies, there is no need for probate since the assets are still titled to the Living Trust. The Living Trust continues in Wesley's capable hands, providing a college fund for their granddaughter. When she is out of college, Wesley is permitted to terminate the Living Trust and to distribute the remaining funds as instructed in the Living Trust made years earlier by his parents.

Jack and Beverly's foresight in setting up the Living Trust helped them avoid ruin during Jack's illness, provided for Beverly's continued security, helped pay for college for their granddaughter, and ultimately released the funds to their heirs. All without a moment in court, as a private and confidential process.

Spendthrift Protections

A spendthrift is a person who spends money in an irresponsible or extravagant manner. If you have put funds into a trust for someone, perhaps an adult child or grandchild, you want the funds to be spent to achieve the correct purpose, such as paying for education, health care, or other necessary support for the beneficiary.

A spendthrift provision prevents the funds from being wasted or spent frivolously. It protects the beneficiary and the trust fund. Each state's law may be slightly different, but the intent is to forbid the beneficiary from certain activities. For instance:

- The beneficiary may not directly spend the trust funds. Only the Trustee can determine in an expenditure is appropriate, in keeping with the Grantor's instructions.
- The beneficiary may not give creditors access to the trust assets. If the beneficiary takes a personal loan or buys a car, the beneficiary cannot use the trust as collateral.
- The beneficiary's creditors cannot attack the trust because the beneficiary never owned the trust assets.
- If the beneficiary, through poor judgment or bad circumstance, is forced to file for bankruptcy, the trust is not involved (except for any funds that are distributed out to the beneficiary in a routine manner).

Selecting a Trustee

A proper Trustee is key to a successful Living Trust. The Trustee is the manager of the trust's assets, and they are the person who must follow the instructions laid out in the Trust. A Trustee holds legal title to the trust's assets and exercises a type of control different and more reliable than the power held by an Agent under a Durable Power of Attorney.

Selecting the Trustee and alternates must be done carefully. Choose someone you trust deeply, who has good business sense, and who desires to assist you. Do not overlook the emotional component: your Trustee is your caretaker and your watchdog. Select someone with whom you will be comfortable. In addition, select two people (or a bank trust department) to serve as successor Trustee in sequence so that the Trustee will always be someone you selected. A properly drafted trust will never need to rely on a court appointed Trustee.

Your Trustee, whether an individual or bank trust department, has very specific legal rights and duties spelled out your state's trust laws. These legal provisions can be adjusted in the Living Trust agreement to fit your desires.

The Grantor as Trustee

A Grantor commonly serves as their own Trustee. This provides significant benefits. As Trustee, the Grantor will see little practical difference between before and after the Trust was established. The Trustee holds legal title to the trust assets, so the Grantor/Trustee retains

full control. If they are also the beneficiary they hold equitable title, the right to benefit from the assets.

When the Grantor is healthy, they can continue to act as Trustee. Should they require or desire assistance, a well written Living Trust will provide for a successor Trustee to assume their duties. The transition does not require court intervention to hand over control.

Bank Trust Departments

A bank trust department is allowed to act as Trustee, but it is not required. Any trusted individual can serve. Bank trust departments offer the advantages of professional management, support staff, and the potential for increased income from investment opportunities only open to financial institutions.

Many worry that involving a bank will be too expensive or too intrusive. Those are valid concerns. However, a properly written trust with adequate safeguards and a carefully selected institution can mitigate these issues.

Banks charge a fee for their services, and every bank charges a different fee. Usually, the bank's fee is based on assets under management. For example, an estate may pay a 1.5% annual fee for Trustee services at one bank, and but only 1% at a different bank. Rates vary at different institutions and so does the level of personal attention. Ask for the bank's fee structure before you nominate them serve as Trustee.

Individuals often act as Trustee without a fee or they charge a fee that is less than comparable services from a bank.

Trust Department as Successor Trustee

A bank can serve as successor trustee. In these circumstances, the Grantor names themselves or a trusted person as the initial Trustee and the bank as successor. Then, the bank will only become active (and only charge a fee) after the initial trustee is no longer able or willing to serve. Speak to your attorney to choose the timing of the bank's involvement and choose the degree of management they will offer.

Documents Accompanying a Living Trust

A properly drafted and executed Living Trust is the foundation of an estate plan. As important as it becomes, the Grantor still need several other current legal documents to help round out a complete estate plan. These include a pour-over Will, Powers of Attorney, and Medical Directives.

A Pour-Over Will

A pour-over Will says, essentially, that any asset not owned by the trust when the Grantor dies is willed to the Living Trust. It is called "pour-over" because it is designed to gather any assets not yet in the trust and

“pour them over” into the trust. The pour-over Will should be written to be ready for probate.

For example:

> Margie decided to create a Living Trust so that her son could receive her estate without probate. She was very careful about putting all her assets under the name of the Living Trust.
>
> Several years after the Trust was established, Margie’s good friend Liz asked her for a loan. Wisely, Margie declined to give Liz any of her own money. They were close friends, so Margie offered to co-sign a loan with Liz at the bank. When they arrived at the bank, the banker was happy to extend the loan if Margie would deposit $50,000 as collateral. Margie did so, but made the deposit in her own name, not the Living Trust’s name.
>
> All would have gone well but for Margie’s sudden illness and death, if Margie had been able to manage the loan throughout its term she would have transferred the money back into her trust when it terminated. Instead, when her son went to the bank to get the $50,000, showing his credentials as Successor Trustee of her Living Trust, the bank insisted that he probate her Will before it would turn over the money. He probated her pour-over Will, and the money was funded into the Living Trust.

If Margie had made only a Living Trust (and neglected to make a pour-over Will) her son would have had a great deal more trouble securing the $50,000. Because her attorney recommended a pour-over Will to

complement the Living Trust, her misstep was no more than an inconvenience.

A Durable Power of Attorney

A Living Trust cannot do everything on its own. If the Grantor/Trustee becomes disabled, their Successor Trustee can manage any assets that belong to the trust, but they cannot handle the Grantor's personal affairs. For that, the Grantor needs to designate an Agent in a DURABLE POWER OF ATTORNEY.

Example One:

> Don set up a Living Trust and began funding it with his assets. He also signed a Durable Power of Attorney to his son Brian. About a week after he signed the trust, Don had a minor stroke. While the doctor saw to his recovery, Brian used the Power of Attorney to finish what Don had started. Brian changed the bank accounts, brokerage account, and house over to the Living Trust. Although Don recovered, his trust would not have accomplished its goals had Brian been powerless to convey assets.

Example Two:

> Don's Living Trust is in great shape; it is fully funded and operational. Don has another minor stroke, and while he is in the hospital he gets a letter from the IRS about last year's taxes. Brian can use the Durable Power of Attorney to hire counsel for Don, get information from the IRS, and try to settle the tax problem for his father. Without the Durable Power of Attorney, Don would have no legal backup at a vulnerable moment.

Advance Medical Directives

While thinking about the future and making the plans, include a MEDICAL POWER OF ATTORNEY and an ADVANCE DIRECTIVE. While these documents do not directly relate to a Living Trust, they round out an estate plan and should not be overlooked.

REVOKING A LIVING TRUST

Most Living Trusts end automatically at a specified future date, as scheduled by the Grantors when they establish the trust. Occasionally, the circumstances that prompted the Grantors to establish the trust change so drastically that they may decide to terminate the trust ahead of schedule.

In order for a Grantor to revoke their trust, they must first verify whether they retained the power to revoke. If they gave up the power to revoke, the trust is irrevocable; it cannot be prematurely terminated and its authority cannot be withdrawn. If it is revocable, the trust document itself should recite the steps to revoke it.

Generally, revoking a trust is done by signing a written statement called a “revocation statement” that declares the trust terminated. After the Grantor signs the revocation statement, they need to “un-fund” the trust by moving their assets out of the trust. They need to contact their bank, broker, and other financial institutions which may require a letter of instruction.

The process of unraveling the legalities of the Trust could take several weeks.

As the Grantor revokes the trust, they must decide on a new and appropriate form of ownership for the trust assets. Also, they must be certain to have an alternative estate plan, probably a new Will, to identify their heirs.

IRREVOCABLE TRUSTS

The choice to make a trust *irrevocable* must be made deliberately. Once a Grantor starts an *irrevocable* trust on its course, they cannot stop it until it reaches its destination. That may be in just a few years, such as if the trust is for a grandchild's education, or it may be decades away; it depends on the irrevocable trust's purpose.

One use for an irrevocable trust is as tool to reduce estate taxes. Any gifts from the Grantor to the irrevocable trust reduce the size of their taxable estate. The Grantor will then save on estate taxes because there is less for the IRS to tax. This type of trust requires that the Grantor retain no interest in the trust's corpus, and give up control of the trust's management. If it becomes effective upon the Grantor's death and is for the benefit of the surviving spouse and/or children, it is commonly called a "credit shelter trust."

Another purpose for an irrevocable trust is to allow the Grantor to direct the use and application of the assets.

For example:

> Tiberius wants to give $14,000 to his grandson James for his education but Tiberius fears he will spend it on fast cars and alcohol. Tiberius instead should create an irrevocable trust with the help of an attorney and draft it so that the money can only be used for educational expenses. If James wants the benefit, he will have to go to school. He can get a job and use his own money to buy fast cars and alcohol (if he still wants to).

This example has a deeper technical tax problem to do with taxes, which is why you should always speak to an attorney when establishing a trust and creating your estate plan. If you give money to your grandchild directly, it is under their control and entirely out of your control. If you give money to an irrevocable trust, your grandchild does not control it. Rather, they have a "future interest", and the money itself is controlled by the Trustee. Federal tax law does not allow you to use your annual gift tax exclusion on a future interest. Hence, if you give $14,000 to an irrevocable trust, you may owe gift tax on the transfer while if you gave the money to your grandchild directly you probably would not owe any additional taxes. To get both advantages, control and the right to use the unified gift and estate tax exclusion, estate-planning lawyers came up with an alternative called a "Crummey Trust".

A Crummey Trust

A Crummey Trust is named after D. Clifford Crummey and his family who, in early 1968, were involved in a

lawsuit with the IRS[36]. Here is the story: in 1962, the Crummey parents executed an irrevocable living trust for the benefit of their four children, two of whom were minors. Initially, they contributed $50 to the trust and over the rest of 1962 and 1963 they contributed an additional $66,615.58 in three separate deposits. In both 1962 and 1963, Mr. Crummey and Mrs. Crummey claimed a $3,000 per beneficiary tax exclusion ($12,000 each). The Commissioner of Internal Revenue determined that each of the Crummey parents were only entitled to a single tax exclusion and assessed a large deficiency. The Crummeys challenged the determination and, after a lengthy legal battle, won.

Because of the Crummeys' bravery and self-sacrifice, a modern Crummey Trust uses a legal technique called a "limited right of withdrawal" to get around the future interest problem. A limited right of withdrawal allows the beneficiary a small window of opportunity to withdraw assets from the trust. The window is very short, only a 30-day period after the asset is transferred into the trust. As soon as the windows is opened, the future interest becomes a present interest and the grantor can take advantage of their gift tax exemption.

The beneficiary should not take advantage of the window, instead they should allow the trust to fully

[36]Crummey v. Commissioner, 397 F.2d 82 (9th Cir.1968).

mature. It is fair to warn the beneficiary that use of the withdrawal power may preclude future deposits.

Using a Crummey Trust, you can put that $14,000 gift into trust for your grandson and not pay a gift tax on the transfer. It is as though the gift was given directly, even though the funds remain under the Trustee's experienced control and watchful eye.

Irrevocable Life Insurance Trust

In a large estate, life insurance poses an estate tax paradox: every dollar of new insurance increases the size of the estate. Assuming an estate is already larger than the exemption amount, estate tax goes up because of the purchase of that new life insurance. If an estate is not larger than the exemption amount, life insurance can push it over the boundary.

In this situation, an Irrevocable Life Insurance Trust (ILIT) can help control the size of a taxable estate and prevent additional taxes. An ILIT prevents new life insurance from being included in the taxable estate. Subsequently, the new insurance owned by an ILIT does not increase the size of the estate, and estate taxes do not go up. All of the insurance proceeds are available to benefit the decedent's family.

For Example:

> Virgil's estate is valued at $5,600,000 and he is single. When he dies, the gross estate tax will be about $60,000 (in year 2016). If he buys life insurance of $60,000, he can get caught in a loop in which the

> increased value of his estate causes an increased amount of estate tax. If he buys more insurance, he'll owe more taxes and so on and so forth.
>
> In order to avoid this, Virgil buys life insurance with an ILIT thus separating the value of the insurance from the rest of his estate.

Like all solutions, however, an ILIT has certain disadvantages. An ILIT restricts the Grantor's right to access the insurance during their lifetime, they cannot borrow against the cash value of the policy.

If a person already has a life insurance policy they can move it into an ILIT, but it will remain a part of their taxable estate for the next three years. On the contrary, a brand new policy purchased with an ILIT never becomes part of the Grantor's taxable estate.

An ILIT may be combined with a Crummey Trust. Typically, in these circumstances, the Grantor makes an annual contribution to the trust which the Trustee than uses to pay the life insurance premium when they come due. After the Grantor's death, the life insurance proceeds are paid to the ILIT and the Trustee can either purchase assets from the Grantor's estate to provide liquid capital to pay for post-death expenses or the value can go directly to the Beneficiaries. This way, the Grantor can provide a significant non-testamentary gift to their heirs, the Grantor's assets can be preserved, and the estate is subject to a small tax burden.

Charitable Trusts

The Internal Revenue Code was designed not only to collect taxes; it is also one of the federal government's primary tools for social reform. The IRC allows a person to reduce their taxes by sending money to a properly accredited charity, thus encouraging and motivating charitable giving. Charitable donations are not subject to gift tax, and the charity does not pay income tax on your donation.

In their most basic form, charitable gifts are quite simple.

For example:

> When a person gives $1,000 to the Alzheimer's Association, they take a $1,000 deduction from their income tax. In the 28% bracket, you eliminate $280 of income tax that year.

Overall charitable deductions in a single year cannot exceed one-half of a person's "contribution base", which is defined by the IRS as their "adjusted gross income" (income after deducting IRA, Keogh, or SEP contributions).

Estate Tax Effect

A person can reduce the size of their taxable estate by making a charitable gift during their lifetime.

For example:

> Foggy is in the 28% bracket and he gives $30,000 to charity. That year, he saves $8,400 on income tax. He

also reduced the size of his estate by $30,000, and after his death, the estate pays less estate tax.

Tax savings depend on the overall size of an estate. The most a person can save is 40%, so a $30,000 gift can reduce estate taxes up to $12,000. Because of income tax and estate tax savings, Foggy's $30,000 gift actually cost him about $9,600.

Ways to Give

There are various ways to donate to a charitable organization:

- Give cash. Valuation of the gift is very easy.
- Give personal property or real estate. Valuation is more difficult to define, and the donor may have to pay for an appraisal to validate their tax deduction.
- Give life insurance. Also easy to value and multiplies the power of the gift. For example: A simple donation of $30,000, will only ever be $30,000. But, if the donor buys life insurance using the $30,000 to pay a single premium and nominates the charity as beneficiary, the charity will receive the entire death benefit which should greatly exceed the premium.
- Give a more loosely defined benefit, like the income or the "leftovers" (remainder) from an investment. This can be accomplished by using charitable trusts or pooled income funds.

These are not the only options. It may be unsettling to give away enough of your estate to significantly reduce your taxes, so consider a more complex method of

charitable giving than direct cash donation. Other options, such as a Pooled Income Fund, Charitable Lead Trust, and Charitable Annuity Trust allow you to retain certain benefits at the same time you are helping a charity.

Special Needs Trusts

Often, an incapacitated adult qualifies for public benefits under SSI (supplemental security income) or SSDI (social security disability income). SSI has qualifying standards very similar to those that relate to qualifying for Medicaid; SSI can be denied or stopped if the beneficiary's monthly income or savings are too high. In contrast, SSDI is an earned benefit that is not taken away if the person has assets in the bank or monthly income.

Since a SSI beneficiary is barred from having too much income or too many resources, people considering leaving a gift to a disabled adult should consider other options before making a Will with a simple bequest. One option is to select another responsible and capable adult to inherit the estate subject to a non-binding understanding that the money is to be used for the disabled person. This is a viable solution, but it does not provide any safeguards to ensure that the disabled person will be cared for properly.

A Special Needs Trust (sometimes called a Supplemental Needs Trust, or "SNT") is a legally binding alternative to provide for the disabled person

while maintaining their ability to receive government benefits. The trust becomes the owner of the gift when the grantor dies and the Trustee has broad discretion over when and how much to provide in benefits to the disabled adult. In this way, a SNT turns the asset into non-countable resources for SSI and SSDI. The applicant may qualify for public benefits even though the assets exist whereas, if they were outside the SNT, the applicant would not qualify for public benefits.

In order to qualify as a SNT, the trust establishment document must contain highly specialized provisions stating that funds must only be distributed for items not paid for with public benefits. Thus, SNTs meet two goals. First, the beneficiary's needs are fulfilled partially from the trust and partially from public benefits. Second, the trust's funds last many years longer (because the trust is limited to paying for things public benefits do not cover).

SNTs are allowed by a provision of federal law referred to as section 1396p of the Social Security Act[37]. It begins with the premise that a person can<u>not</u> simply take resources, place them into a trust, and then claim they are no longer accessible… unless special conditions are met. A SNT may contain assets, and

[37] 42 USC 1396p

those assets will not be counted against the person who is trying to qualify for public benefits if:

1. The disabled person applying for benefits is under age 65 and: a) the applicant is disabled as defined by Social Security; b) the SNT was established for the benefit of the applicant by a parent, grandparent, legal Guardian, or a court; c) the SNT receives assets that belong to the applicant; and, d) the State will receive all amounts remaining in the SNT upon the death of the applicant up to the total medical assistance paid by the State.
   OR
2. The disabled person applying for benefits is of any age and: a) the applicant is disabled as defined by Social Security; b) the SNT was created for the benefit of the applicant by a parent, grandparent or other individual desiring to provide for the applicant's needs; c) the SNT receives assets that belong to the person who created the SNT; and, d) when the applicant eventually dies, the remaining funds can be paid to anyone the SNT's creator selected.
   OR
3. The disabled person applying for benefits is of any age and a) the applicant is disabled as defined by Social Security; b) the SNT was established by and is managed by a nonprofit association (where a separate account is maintained for each beneficiary of the SNT, but, for purposes of investment and management of funds, the SNT pools these accounts) but the account inside the SNT was established for the benefit of the applicant by the applicant themselves, or by a parent, a grandparent, a legal Guardian or a court; c) the SNT receives assets that belong to the applicant; and, d) when the applicant dies, the SNT

keeps the remaining funds. This is called a “Pooled Trust”.

Controlled Income

Once a person has qualified for SSI and SSDI, they will receive a monthly income stipend and their medical costs will be covered. The stipend will not and cannot be large, and if the applicant receives income from other sources, the government may decide that the beneficiary no longer needs the stipend… and when it is lost, so is the medical coverage. Thus, it is important for the applicant’s monthly income to remain at a very low level.

Since distributions from a SNT might be counted as income (or might not, depending on the purpose for which the distribution is made) it is vital to know how the government categorizes SNT distributions. Sometimes funds paid from a SNT will be treated as income, and sometimes they will be ignored. When each will happen is exceedingly complex and could fill a fair sized book.

For example:

Funds are paid from the SNT to pay rent (to provide housing for the applicant) are treated as income to the applicant and may jeopardize the public benefits. However, if the SNT itself purchases a home and owns title to the home, allowing the applicant to live there rent-free, it is considered “in-kind support and maintenance” and the applicant’s benefits will be reduced by the “Presumed Maximum Value” which is equal to $20 plus 1/3 of the maximum SSI amount.

Examples of other distributions that are allowed include cleaning services for the home, dental care, medical insurance premiums, eyeglasses, travel and entertainment, training programs, and medical procedures that the government would consider “not medically necessary”. Clearly those benefits can make an applicant’s life more comfortable, and they supplement the benefits provided by the public.

A SNT should be drafted to only pay for thing the beneficiary’s government benefits will not cover. This will improve the beneficiary’s life, maintain their public benefits, and minimize consumption of the SNT’s assets.

High Pressure Trust Sales

Beware free seminars on Living Trusts. The person hosting the seminar is only interested in selling you a product, not crafting a legal solution to meet your needs.

Controls on Attorneys

The State Bar of Texas, which is charged with enforcing the disciplinary rules that all Texas lawyers must follow, publishes guidelines on advertising Living Trusts. Without objective substantiation “a lawyer may not advertise that a particular approach to a legal problem … is superior” when compared to other “accepted and appropriate approaches” to the same problem. Your lawyer is your fiduciary and operates in the strictest confidence; their job is to find the best legal solution to

meet your needs. A person peddling Living Trusts is only interested in profit, they want access to your financial information to sell you financial products or possibly sell your financial information itself.

Specifically, the Bar says ads touting the exclusive use of Living Trusts can be misleading, and may create unjustified expectations. Non-attorneys are not obligated to tell the truth.

> For example, this is an ad that ran in a major newspaper a few years ago (before the estate tax exemptions increased):
>
> "with a Living Trust… if you are married and your estate is worth less than $1.2 million, there will be no federal estate taxes to pay"
>
> "without a Living Trust (even if you have a will) … if you're married and your estate is over $600,000, without proper tax planning your family may owe federal estate taxes of 37%-55%"

Viewed from a narrow perspective, both of these statements were true but misleading (disregarding that the 2016 estate tax only applies for estates above $5.45 million). But, the ads lead you to believe a Living Trust *always* saves taxes. The ads ask you to believe that even if you have a Will, the absence of a Living Trust results in high estate taxes. In truth, either a proper Living Trust or a proper Will can provide exactly the same estate tax relief, and a qualified attorney will know how to implement these solutions.

Another tactic used by advertisers alleges:

> "probate could take months or years, and probate fees could be substantial" and a Living Trust transfers your estate "quickly without the expense of probate"

Again, both these claims are often true but misleading. There are many situations in which probate is simple and cost effective. Conversely, there are many situations in which probate is complex and expensive. A Living Trust might save time and money, or it might waste time and money. Living Trusts are not the sole solution to tax and estate problems. Like so many other legal solutions, it depends on the specific situation. Every person has unique attitudes and unique problems, and needs exposure to a unique set of solutions.

Beware Biased Advice

The Texas Bar rules concluded that Lawyers may offer free seminars on estate planning in general, and may advertise that a seminar will discuss the advantages of Living Trusts. Non-lawyers (like insurance Agents and stock brokers) are not subject to the same restrictions and can misrepresent the benefits of a Living Trust without penalty. Thus, beware recommendations made by non-lawyers and only hire a financial planner if they are bound to act as your **fiduciary**.

One size does *not* fit all. A salesman who makes his living selling widgets wants to sell you widgets. Your lawyer is not a salesman; your lawyer is a professional looking out for your best interests. Your lawyer should find out what best fills your needs, not sell you whatever makes them the most profit.

Direct Trust Sales by Non-Attorneys

Thousands of seniors receive fliers every year from estate planning companies with an invitation to a free seminar. These fliers often state that some new laws took effect on January 1 “that could make it a felony to gift money, property or hold accounts in joint tenancy”.

The law has not changed, at least not in the way described. The fliers are misleading. These companies are not licensed to practice law; they are illegal operations which often charge higher fees than licensed attorneys. They also avoid the controls imposed on licensed attorneys and bear no professional liability for errors. Many State Attorney Generals have taken action against “strong-arm” trust sales. It is up to the smart consumer to avoid them completely.

These companies use a salesperson to gather a prospect’s financial information which is sent to a “trust mill” in another state. The standardized forms are then returned to the salesman. Often, the prospect is told that an attorney will review the documents. Do not be fooled by this arrangement; the attorney never meets the prospect and never assesses their unique needs. They are under pressure from the trust mill to rubber stamp documents and receive a great deal of business in return. They are not *your* attorney.

Stay away from non-attorney trust sales. See a qualified Attorney to compare and contrast the costs and benefits of a Living Trust against other planning techniques.

PART 6: Planning for Death - Wills and Intestacy

INTRODUCTION TO WILLS AND INTESTACY

We cannot tell our futures, and do not know when our time will end. While here, we work hard to live worthwhile lives, which in no small part includes earning and maintaining our financial resources.

An estate plan protects those resources. It protects the people you love and the charities you cherish. Planning for our eventual deaths should be routine and should be done by everyone, but far too many people think that ignoring reality will avoid or delay death. Some of those hopes are superstitious, some are wishful thinking, but most are likely lack of time, lack of focus, and lack of direction.

A Will is the legally binding expression of a person's instructions about concluding their affairs after death. It involves providing for payment of debts and taxes, identifying heirs, specifying what assets the heirs receive, and nomination of an Executor. These are weighty issues which many people are hesitant to address.

If you procrastinate and do not get around to expressing your wishes in a Will, the State has a plan set up for you. The State has no idea of who and what is important to you, and never asked your opinion before it set up your default estate plan. Suffice it to say that the State's plan is very likely wrong for you.

Intestacy

If a person died without a Last Will and Testament, they are "intestate" (a person who dies with a Will is considered "testate"). Each state has slightly different laws to determine what will happen to an intestate person's assets and who will inherit. In all cases, the family of the deceased will not have a say.

The Texas and Washington laws of intestate succession are good examples.

1. If a Texas or Washington resident dies without a Will, their estate will first go to their surviving spouse (except for Texas's second family exception, discussed below).
2. If they are unmarried, their estate will go to their children.
3. If they have no children, their estate will go to their parents.
4. If they have no surviving parents, their estate will go to their siblings (and in Texas, to their nieces and nephews).
5. If they have no siblings, their estate will go to their grandparents.
6. If they have no grandparents, their estate will go to the descendants of their grandparents.

7. If their closest living relative is further than first cousin, their estate "escheats" to the state.

Intestacy disregards friends, unmarried partners, distant family, and charitable organizations and there is no opportunity for fine control. The estate is treated as a single large block regardless of the deceased's un-formalized wishes.

You may think that the pattern set up by the State sounds like what you would do if you created a formal Will. The answer as to why you should not rely on the laws of intestate succession lie not only in the results, but in the legal process the family must endure to get to those results.

Probate of a Will can be quite simple. However, if a person dies intestate it is likely the legal procedures will be very lengthy and expensive. The same people may end up inheriting either way, but without a Will they must spend more money to prove they are the decedent's proper heirs. Preplanning streamlines the procedures by identifying a person's heirs and what they will receive, and in this way saves significant time and money.

The Texas Second Family Exception

If a Texas resident with a second family and children from the first marriage dies intestate, then the children from the first marriage inherit half of the community property.

For example:

> Greg and Abby are married and have three children. Greg dies, and several years later, Abby marries Judy. They are married nearly 20 productive years and accumulate substantial wealth. Abby dies intestate. Her three children inherit her ½ of the community estate. Judy must be content with the remaining half.

The only ways to defeat this legal exception are to make a Will or a Trust that gives explicit instructions to the contrary, or to rely on other non-testamentary transfers like Rights of Survivorship.

Last Will & Testament

A Last Will and Testament is written legally binding instructions from a person regarding how to conclude their affairs after they die and pass their estate according to their wishes. When considering creating a Will, address the following concerns:

- Identify heirs and alternate heirs if the first choice is not available and what the heirs will receive;
- Identify who will serve as Executor and carry out the terms of the Will;
- Appoint Guardians for minor children, if any;
- Provide for pets and dependent animals, if any;
- Create a Trust to protect disabled or minor heirs; and,
- Plan to reduce or to eliminate estate taxes.

Many Americans avoid making a Will. There are many possible reasons. Making a Will reminds people of their mortality, which may make them feel uneasy. Or,

perhaps making a Will reminds people that their personal or financial affairs are a mess, which they want to keep private. Another potential barrier is that making a Will requires dealing with a lawyer, an experience many people would rather avoid.

There are serious reasons to put these concerns aside and prepare a Last Will and Testament before it is too late. Here are some of the benefits of making a Will:

1. Specify heirs. If a person dies without a Will, state law determines who receives their assets when they die. Usually the heirs identified by the law are different from the heirs they would choose.
2. Save time and money. If a person dies without a Will, their estate is likely to go through complex, expensive, and intrusive intestacy proceedings to determine the deceased's proper heirs and who should manage their estate.
3. Reduce taxes. If a person dies without a Will, their estate may be exposed to higher estate taxes. The estate tax is the Federal Government's highest tax.
4. Show your family how much you care. If a person dies without a Will, their family may quarrel over their estate. No matter how well children get along, a parent's death will cause anxiety. Too often, this flares into disputes over family treasures or land. It separates brothers and sisters for decades. Guidance from a parent, in their Will, provides family direction it needs to stay together. The cost and effort it takes to

> prepare a Last Will and Testament today is inconsequential compared to the increased harmony it provides your family after you die.

Preparing a Last Will and Testament is neither expensive nor unsettling with the right attorney. Ask for a referral from friends, doctors or hospitals, or community organizations.

Clearly Identify Heirs

A Will allows a person to identify their heirs. Heirs in a will are called "devisees" and the gifts they receive under a Will are called "devises" or "bequests". The Testator can include or exclude whoever they like; there is no legal requirement that an inheritance go to anyone in particular. No one has the right to demand to be a devisee; it is the Testator's choice.

The best approach is to identify devisees by name, but devisees may also be identified as a group or by class. An example of a class is a Will might state that the Testator leaves the estate to "my children" or to the "issue of my children". In this case, it is vital to identify who belongs to this group. Name the members of the class elsewhere in the Will.

Hagaman et al v. Morgan: A Lesson on Class Identification

Hagaman, a 1994 case decided in Dallas, Texas,[38] displays out the potential pitfalls of not clearly identifying the members of a class.

In *Hagaman*, Kathleen made her Will knowing that her son had adopted his stepdaughter Martha, his wife's daughter from a prior marriage. The adoption transformed Martha into her son's legal child.

Kathleen wanted to leave Martha out of her Will and instructed her attorney to leave her estate to her son's "bodily issue". By using the phrase "bodily issue, she intended to limit the inheritance to children who were her son's biological descendants.

After Kathleen died, Martha claimed to be the bodily issue of her adoptive father so that she could claim part of Kathleen's estate. According to the Texas Family Code, an adopted child is treated like a biological child. The Court, upon reviewing the law, decided that Martha should inherit.

Adopted Children

As the *Hagaman* case shows, a person adopted into the family is treated by the law as though that person was a

---

[38]Hagaman et al v. Morgan, 886 S.W.2d 398 (Tex. App. – Dallas 1994).

natural biological child of the adoptive parent. In reality, that adopted child has two sets of parents: the ones who adopted her and the ones who gave her up for adoption. Can a child given up by the parents still be their heir, or does the act of giving up the child terminate the relationship?

Historically, Texas law allowed a biological child to inherit from a biological parent, even if that child was adopted by another parent (but only if the biological parent died intestate).

That changed on September 1, 2005[39]. The new law slightly changed the old. Under the new law, an adult who is adopted may no longer inherit from an intestate biological parent.

It is important to distinguish between adoption of an adult and a minor. When an adult is adopted by another family, the adult loses the right to inherit from the intestate biological parent. Minor children (under the age of 18) who are adopted continue to have the right under the new law to inherit from the intestate biological parent. The child's age on the date of adoption is the key rather than the child's age on the date the biological parent's death.

[39] HB 204, 79th Regular Session, changing section 162.507(c) of the Texas Family Code and section 40 of the Texas Probate Code (now section 201.054 of the Estates Code).

The best way to control who inherits is to clearly name specific heirs. If you have an adopted child, include or exclude them by naming them. Similarly, if you have given up a child for adoption, control who inherits by clearly identifying whether you want the child to inherit from you. Silence creates a void that must be filled by the courts, and the law's solution may not be the right one for you.

║ *Including Someone Not Specifically Identified*

The legal term "pretermitted child" means a child who is born after the date the Will was written.

> For example:
>
> Betty has two children. Bob was born in 1955 and Sylvia was born in 1957. Betty wrote a Will in 1956 that left her estate to her husband, and if he is not alive then to Bob. In 1999, Betty's husband died, leaving everything to Betty. Then, Betty Died in 2002. She never updated her 1956 Will, so there is no mention of Sylvia in it. According to Texas law, Sylvia is a "pretermitted child" who may be able to inherit along with Bob anyway.

In the case of *Gorski v Welch*[40] the Court applied Texas law to allow a pretermitted child to receive a portion of the estate even when they are not mentioned in the Will,

---

[40]Estate of Leroy Gorski v. Diane V. Welch, 993 S.W.2d 298 (Tex.App. - San Antonio 1999).

not provided for in the Will, or not otherwise provided for outside the Will in a manner intended to replace a Will-based inheritance. The *Gorski* court said that for a pretermitted child to receive part of the estate, "it must appear from the Will, interpreted in light of all the circumstances, that the failure to provide for the child… was accidental, or due to inadvertence or oversight."

Most of the appellate court cases on pretermitted children take a conservative approach to recognizing inheritance rights. Texas law requires a variety of factors to be proven before a pretermitted child will inherit. If all those factors are proven and the child's right to inherit is legally established, then those inheritance rights should extend to the next generation as well.

For example:

> Daughter Sylvia was clearly established as a pretermitted child, but Sylvia died in 2001 (the year before mother Betty died). Sylvia's children should be entitled to the same inheritance Sylvia would have gotten if she had outlived her mother Betty.

Although the definition of pretermission is clear, the issue of whether those rights extend to the grandchildren through the children has not been ruled upon by a Texas appeals court.

It is, on the other hand, very clear that the concept of pretermission does not apply directly to grandchildren.

For example:

> If Betty's Will said, "I leave everything to my two grandchildren Jim and Joe”, and a year later a third grandchild named Julie is born, Julie is not automatically included as Betty's heir (even though Julie was born after the Will was made). The pretermission statute includes only Betty's the natural born or adopted children when granting inheritance rights, not her grandchildren.

The grandchild's only hope is to receive by virtue of their parent's right to receive.

Illegal Heirs

State law says that two categories of people cannot be heirs in a Will, regardless of the Testator’s wishes. They are:

In order to prevent dishonest attorneys from writing themselves into a Will, the attorney who drafts a Will or who oversees its creation cannot be named as heir. In addition, any employee of the attorney, or any heir of the attorney also cannot be named (because they would just be the attorney’s surrogate). However, if any of those persons are the Testator’s spouse, ancestor or descendant, or are related to the Testator within the third degree, then it is legal for them to be an heir.

In order to encourage independent witnesses who have no vested interest in the Will, a witnesses who is also required to testify on the validity of the Will cannot be an heir. A formal Will needs two witnesses to be valid. An exception exists if the Will is self-proven. In that case, witnesses are not required to testify to prove the Will and they can be an heir. Another exception exists

if the witness would also be an "heir at law" (under the laws of intestacy). In that case, the witness can still inherit, but their inheritance is limited to not more than they would have received if there was no Will.

Most states have so-called "Slayer Statutes" that prohibit any inheritance from passing to the decedent's murderer. Check local law to see if your State has such as law. Texas, for example, does not have a Slayer Statute and is prohibited from having one by the Texas Constitution[41]. Even though there is no statute controlling this situation, Texas courts can impose a constructive trust on any inheritance a murderer would receive from the victim, effectively denying the murderer any economic benefit from the crime[42].

Survival Requirement

A Testator's heirs must survive them in order to inherit, this is called a survival requirement. State law imposes a default survival period, 120 hours (5 days) is common. When making a Will, a Trust, or other written disposition of property upon death, the Testator has power to require the named heirs to outlive them by any chosen time period.

---

[41] Texas Constitution, Article 1, Section 21.

[42] Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977)

A Will might say, for example:

"I, Sam Beckett, leave everything to my children Kate Beckett and Tom Beckett. If a devisee fails to survive me by 30 days, that devisee's share shall instead pass to their spouse".

In this example, if Sam later dies and his daughter Kate happens to die, for instance, 7 days later, she would be treated as though she died before Sam. Her share would pass to her spouse.

By requiring a survival period, Sam was able to maintain control of his estate for a longer period. If Kate had outlived Sam past 30 days, her share would have passed to her estate, and her own Will would have decided how that portion of Sam's estate would pass.

Some attorneys try to maintain control through longer survival time periods. Instead of 30 days, the Will might require 60 days, or 90 days. The down side of this is that imposing a lengthy survival time forces the heirs to wait until that time has passed before they can receive their inheritance.

If the Will says "my heirs must survive me by a year" then none of them get anything until the year ends, which will likely make them very unhappy. A balance must be found; the survival period should be short enough to be convenient yet long enough to provide statistical protection. The default 120-hour period is too short. It does not retain control on the Testator's intentions for long enough. A 30-day period strikes a good balance. It is likely that anyone who outlives the Testator by 30 days will outlive them for years to come.

‖ *Disinheriting Someone*

The law gives a person the absolute right to select their own heirs. No one has the right to demand to be an heir.

Attorneys often recommended simply giving a person a dollar instead of leaving them out of the Will. That action is too simple. To leave someone out of a Will, the Will should expressly say three things:

First, the Will should acknowledge the existence of the person. By acknowledging that the person exists, the person cannot claim that there were accidentally forgotten.

Second, the Will should directly state that no part of the estate is given to that person. Doing so means that person does not inherit anything under the terms of the Will. The Will can also state that the person is disqualified from any inheritance rights they might otherwise try to claim under state law.

Third, the Will can include a "no contest clause". This says, essentially, that if a court rules that a person who has contested the Will lacked just cause or was acting without good faith then that person loses whatever inheritance they may have otherwise gotten. These clauses often state that the amount of $1 is substituted for whatever larger inheritance the contestant would have received if the contestant had just accepted the terms of the Will.

Ademption: When a Bequest Fails

Ademption occurs when an item specifically devised in a Will has been disposed of or sold so it no longer exists at the time of the Testator's death. In this case, the gift fails or is "adeemed". In other words, an heir cannot receive an item that does not exist as part of the estate even if the Will specifically talks about it. The Testator cannot give away something they do not own. Ademption is not always simple and depends on the exact wording of the Will.

Example One:

Mom's Will said, "I give my house at 123 Green Road to N.C.".

If mom sold the house at 123 Green Road before she died., N.C. does not get the house because the item has adeemed.

Example Two:

Mom's Will said, "I give whatever home I own when I die to N.C."

When mom wrote the Will her house was at 123 Green Road, but she later sold that house and purchased a new house at 456 Blue Road. Since the bequest is "whatever home I own" the gift has not adeemed and N.C. gets the new house at 456 Blue Road.

Example Three:

Mom's Will said "I give the benefit of my house at 123 Green Road to N.C."

Mom sold the house, but carries a note from the buyer and a lien against the house. N.C. may get the note and

> lien, or a court may decide that the gift has adeemed since mom sold the house. A note and lien is not the same as the actual house. Depending on the wording of the Will there can be subtle ambiguity about exactly what N.C. is supposed to receive.

Courts look for the ambiguity to decide whether a devise has adeemed. For instance, in the case of *Lang v. SAAF*[43], the Will gave away the "real property… in my estate… located on Prue Road". The actual lots on Prue Road were sold while the Will's maker was still alive. After she died, the heir claimed that she really meant "the real property development on Prue Road" and that he should get the business enterprise even though the land was sold. The appeals court recognized the ambiguity and sent the case back to the trial court for more proceedings.

In the earlier case of *Bates v. Fuller*[44], Mom's Will said that the "real estate shall be sold", the debts and taxes paid, and the "proceeds remaining" passed to the children. The house was sold by Mom's Agent while she was still alive. The trial court ruled that since the house was no longer part of the estate on the date of Mom's death, the gift adeemed. It was no longer available for the Executor to sell and divide the funds;

---

[43] Lang v. San Antonio Area Foundation, 5 S.W.3d 738 (Tex.App. —San Antonio 1999).

[44] Bates v. Fuller, 663 S.W.2d 512 (Tex.App. —Tyler 1983).

instead, there were only bank deposits on the date of her death, and those deposits would not pass to the children. The children appealed and the appeals court decided that the gift in the Will was not the house itself, but was the proceeds from its sale. It did not matter whether the Executor sold the house or if it was sold before mom died. Either way, the proceeds still existed, and the gift was not adeemed. The children got the money.

Your assets change through the years and you may have to modify your Will to reflect those changes in order to avoid ademption. Most people cannot make a Will once in their lifetime and have it last through the decades. Update your Will as your life circumstances change.

Changing your Will

Create a New Will

The best way to update an old Will is to create a new Will that overrides and supersedes the old Will. In this manner, the prior instructions are erased, thus eliminating confusion and potential conflict.

Make an appointment with the lawyer who drafted the existing Will to discuss the extend and details of the modifications which you desire.

Using a "Memorandum" or a Codicil

A new Will is not strictly necessary, a codicil (an attached amendment to a Will) can also be used. There are two circumstances where a codicil is appropriate:

First, a codicil may be the best approach when a person of questionable capacity, such as an elderly person with mild dementia, desires to change their Will. If the codicil is validated because of the Testator's incapacity, the original Will is unaffected.

Second, a codicil is useful when a person desires to make a simple list of personal effects or memorabilia and append it to their Will. This list can be changed from time to time without changing the original Will.

There are two ways to use a memorandum: as a binding codicil or as a list of suggestions to the Executor and heirs. In the first, the memorandum declares that it is binding upon the Executor and heirs. If a binding memorandum is not properly executed or drafted, it can disrupt the Testator's entire estate plan. For this reason, in order to attach a memorandum as a binding codicil, it is best to visit an attorney to draft the memorandum and to prove it in the same way as a fully attested Will with witnesses and a notary. Alternately, a memorandum could declare that it does not modify the Will and is non-binding. In this case, the memorandum is merely a suggestion to the Executor and heirs. A non-binding memorandum must only deal with personal effects and not with real property and should be accompanied by a statement in the Will to permit such memoranda.

The concept of attaching a handwritten memorandum to a Will is attractive. The idea could simplify the details actually stated in the Will, and provides flexibility. Unfortunately, a memorandum can also create

confusion, which can throw off an expensive and carefully drafted estate plan. If you need to update your Will, speak to your attorney and they will help you update it properly to avoid confusion.

Is a Letter to Your Lawyer a Change to Your Will?

The law is clear that writing a letter (or email or fax) to an attorney with instructions about how to change a Will is not, in itself, a legal change to the Will. The case *Estate of Schiwetz*[45] makes this very clear.

Mrs. Schiwetz made a Will naming several family members as heirs. Some years later, she changed her mind and wrote her attorney four letters with instructions on changing her Will. The changes were not formalized before she died.

Her Will was admitted to probate, and later the four letters were offered for probate by the people who would benefit from the changes. Eventually, the Court held the letters did not express a direct intent to dispose of assets; they were nothing more than instructions to make a change to the Will. The Court stated that, "Instructions or directions to attorneys to prepare a new

[45] 102 S.W.3d 355, In re Estate of Schiwetz (Tex. App. - Corpus Christi, 2003).

will or codicil that carry out the designated changes are not themselves intended to be wills or codicils".

The proponents tried one other logical tactic: they alleged that one of the letters was actually a codicil signed by Mrs. Schiwetz. Her "signature" was at the top of the page, where she identified herself to her attorney. The Court found that mere placement of a person's name on the page (even if in the person's handwriting) was not a "signature" unless it was "written with the intention and purpose that it should be or was the signature" of the person. In this case, the name was meant to identify the party, not to act as a signature.

Thus, the original Will was left intact and all the instructions contained in the letters were not enforced.

Selecting an Executor and Alternates

Your Executor manages your estate and carries out your wishes as expressed in your Will. When selecting an Executor, consider two main factors: experience and convenience. An Executor must be educated and capable of working with the estate's attorney, bank, broker, and other professionals. They should have enough experience to understand your finances. An Executor must also have the time and availability to do the job.

When selecting an Executor, choose one or more alternate Executors as backups. When selecting an alternate, first look to your heirs, perhaps one of them is trustworthy. A bank trust department can also serve as executor, but first you should consider friends, family,

and professional acquaintances. Many trust departments are willing to act, but they will charge for the service.

Independent Administration

Correct legal wording in a Will liberates the Executor from exhaustive court supervision. This saves time and reduces attorney's fees. Be sure your Will has language adequate under your state's law to allow unsupervised probate. It is best if the Executor is referred to throughout your Will as the "Independent Executor". Speak to an attorney to be sure your Will contains proper references.

Waiver of Bond

Unless the Will states otherwise, most states require an Executor to purchase a bond (an insurance policy guaranteeing the Executor will act honestly). The bond must be paid for from the estate's assets. However, if you select an Executor you trust without reservation then your Will can waive the bond and save the money.

Proving a Will

When a Will goes before a Judge, reliable proof must be presented showing the document offered is in fact the decedent's Will. This is called "proving" the Will. There are three methods of proving a Will: witness testimony, handwriting examination, or a Self-Proving Affidavit.

After a person dies, the witnesses may be called to testify in court and prove the decedent's will. This is a traditional method which was effective when people

were less mobile. In modern society, this is often excessively burdensome. People in modern society tend to move frequently; by the time a Testator dies, their witnesses are likely to have moved. Transportation costs and compensation add to the estate's administrative overhead.

If the witnesses are unavailable, a handwriting expert or two persons familiar with the decedent's signature may examine the Will. Experts charge for their services, which increases the estate's administrative overhead.

The best option for proving the validity of a Will is called a Self-Proving Affidavit. The Affidavit is created at the same time as the Will and is signed by the Testator and witnesses before a notary. The Affidavit alone is proof of the Will's validity and a Will accompanied by a Self-Proving Affidavit does not require witness testimony or the services of a handwriting expert.

There are two legal ways to create a Self-Proving Affidavit. The Affidavit either be appended to the Will or integrated into the Will. If it is appended to the Will, it must be signed by the Testator and the witnesses before a notary after the Testator and witnesses sign the Will itself. Attached self-proof requires two sets of signatures and is the traditional method. Integrated self-proof relies upon specific statutory authority in a state's estate code. In the Texas Estate Code, the Testator and the Witnesses both sign the Will itself before a notary. One set of signatures does double duty, both executing and self-proving the Will in one step. This has only been legal in Texas since September 2011.

Storing Your Will

Once a Will is properly created, there are many places where I can be kept. At a minimum, the storage location must be safe, dry, and accessible. Opinions vary on the best storage location.

...at Home

You can store a Will at home if you have a well-protected environment. Consider buying a small fireproof box, available at the major office supplies stores. The biggest threats to the Will are 1) being destroyed by fire, and 2) simply becoming lost. A fireproof box protects against both those risks.

...with the Executor

Your Will nominates an Executor to handle your affairs after you die. The Will could be left in the hands of the Executor for safekeeping; if so, that person will be ready to follow the instructions left in the Will. Storing your Will with your Executor carries the same risks as storing the Will in your home. Ask them to store it in a small fireproof box for safekeeping and accessibility. In addition to the risk to the Will itself, storing your Will with your Executor carries some additional complications: What if you change your mind about who should be Executor? Are you comfortable asking for the return of your Will? If that Executor dies before you do, will your papers be safe in the custody of their relatives?

...with the County Clerk

Your county clerk's office can receive Wills and hold them for safekeeping. Giving a Will to the clerk is not the same as filing the Will (a Will is only filed when the time for probate arrives). Safekeeping simply means that the clerk holds the Will in a vault, and will only release it to the Testator, to someone specified by the Testator, or directly to probate when the Testator has died.

The biggest trouble with the clerk's safekeeping system is that no one thinks to look there. Inform your Executor and heirs if you store your Will at the county clerk.

...in a Safe Deposit Box

A safe deposit box may be a good place to store the Will, or it may not, depending on your state's laws regarding access to safe deposit boxes after the death of an owner. Remember, a storage place must be accessible and different states have different rules regarding accessing a safe deposit box after the death of the renter.

For many years, Texas law required a safe deposit box to be sealed when a renter died until a properly appointed representative opened it with orders from a probate court. This law caused many people to avoid storing important papers in their safe deposit box.

Many states, including Washington State, still follow this procedure. If the Will is locked inside a safe deposit box, it cannot be accessed without a court order which required initiating probate of the decedent's estate

(without their Will). This practice is needlessly complicated and should be avoided.

Some states, including Texas and Washington, have updated their banking laws to allow a joint renter of a safe deposit box to access it after the death of one of the other owners. If you and another person have a jointly rented safe deposit box and one of you dies, the bank must give the survivor access to the box and must allow any items to be removed from the box.

A safe deposit box is a fine choice if there is more than one renter. It is not a good place if there is only a single renter.

For example:

> Kathleen and Kelly (who are married) have a safe deposit agreement with the bank that says they are "Joint Tenants". Under the former law, when Kathleen died Kelly would have been locked out of the box. Under current law, Kelly has the right to open and empty the box.

What if there is no other person as a joint renter? The bank may permit an examination of the safe deposit box, without a court order, by any of the following people after the renter dies: (1) the surviving spouse or renter's parents, (2) any of the renter's adult descendants, or (3) a possible Executor who presents a document that looks like a copy of the renter's Last Will and Testament in order to locate the original Will.

Under the above conditions, the box would be examined in the presence of a bank officer. Legally, however, the

bank is only allowed to deliver specific items to certain people:

- The Will can only be given to the probate clerk;
- Life insurance policies can be given only to the policy beneficiaries; and,
- A deed to a burial plot can be given to the person who is examining the box.
- Other items cannot be removed from the box without a court order.

Valid Alternative to a Formal Will

A formal Last Will and Testament is not required in order to make your wishes known after you die. However, it is the only method that can *essentially* ensure your wishes will be carried out. Holographic Wills are an alternate method, if one that is significantly less reliable.

Holographic Wills

A handwritten Will, also called a "holographic" Will, while valid in most states is unreliable and likely to cause problems. A homemade Will initially saves some money on attorney's fees. But, eventually the inefficiency of a handwritten Will overcomes the initial savings.

Various factors make a handwritten Will less reliable and potentially more expensive than a formal Will:

- If any part of the Will is not in the Testator's handwriting (for example, if a section is typed or

preprinted) the Will is not valid. Beware of “fill in the blank” Will forms that ask only for your signature at the end without witnesses or notarization. These sort of forms are not valid.

- The “plain meaning” of chosen words is not always the legal meaning that will be attached when a handwritten Will is interpreted by the court. A handwritten will may improperly use a legal term of art and either frustrate the maker’s purpose or invalidate the entire will.
- If probate is necessary when the maker dies, it is likely to take much more time and be more expensive than for an attested Will. A holographic Will is unlikely to contain legal “shortcuts” that save time and money which would have been contained in a formal Will.

With all of its complications, a handwritten Will is still better than no Will. If you do not currently have a Will, follow these steps:

> Take a blank sheet of paper, and in your own handwriting identify yourself, give the date, recite that this is your Last Will and Testament, and describe where you want your assets to go when you die. Sign at the bottom of the page. Then call your lawyer for an appointment to make a proper Last Will and Testament.

Invalid Alternates to a Formal Will

Beware Will Forms and Software

Will forms and software packages are available for purchase both online and in office stores. They are inexpensive and widely available. Anyone can go into many of the major office warehouse stores to pick up a blank form. Remember that the most expensive thing in life is a cheap attorney (or in this case, cheap legal documents).

Beware that retail forms and software may not be written to comply with state and federal law. They may also be confusing and difficult to use.

Misleading or not, these software programs are often protected by law. For example, in Texas in 1999 the U.S. District Court decided that certain Will-writing software was illegal in Texas[46]. It was an "unauthorized practice of law"; the software companies were attempting to practice law without a license. The state legislature responded quickly to the Judge's ruling, and passed a bill specifically legalizing Will software, redefining the "practice of law" along the way. Software packaging must clearly and conspicuously state that the

---

[46] Unauthorized Practice of Law Committee v. Parsons Technology, Inc., 179 F.3d 956 (5th Cir. 1999) and Unauthorized Practice of Law Committee v. Parsons Technology, Inc., No. Civ.A.3:97:CV-2859H, 1999 WL 47235 (N.D. Tex. Jan 22, 1999).

products are not a substitute for the advice of an attorney, but they are not illegal.

‖ *Online Will Preparation*

Avoid online Will preparation services. They might be tempting, but websites should be avoided unless they are offered by an attorney licensed in your state. Avoid unlicensed online Will preparation services for the following reasons:

First, online Will preparation services use workers who are not licensed to practice law. Instead, they employ software to knock out cookie cutter legal forms. Sometimes they call their forms “attorney prepared” but what they mean is that a lawyer provided the underlying form, not that a lawyer has prepared anything specifically for you. Your specific papers are either computer generated or filled-in by a clerical employee. Like Will preparation software companies, they successfully avoid the unlicensed practice of law with disclaimers like: "You should consult an attorney in your state for serious legal matters. We are not a substitute for the advice of an attorney”.

Second, communication with online Will preparation services is not legally privileged or confidential. The service provider may sell your information for marketing or other purposes. For example, one website says it “is not a law firm and is not a substitute for an attorney or law firm. Communications … are not protected by the attorney-client privilege or work product doctrine”.

A different form website "protects" your privacy with this tricky policy: "We may collect and/or track … information knowingly provided by you through on-line forms… We may also use your personal, demographic and profile data … for marketing and promotional purposes…. We reserve the right to share, rent, sell, or otherwise disclose data we collect to third parties”. Ask yourself, are these services providing you with legal forms at enticing prices because YOU are their product rather than the document.

By contrast, an attorney must comply with their State’s rules of professional conduct. One such rule requires the attorney to maintain strict confidentiality about a client’s private information. Communications with a licensed attorney are typically protected by the attorney-client privilege.

Third, online Will preparation services provide a false sense of security. It may appear that they provided good legal documents, but they may be using forms that have never been tested before a court. One form website is registered as a “legal document assistant” in Los Angeles, California but provides preparation of legal documents which they claim to be valid under Texas law. Another company omits legal provisions which are critically important under Texas law.

The form websites often provide cookie-cutter mass produced forms that meet only the bare statutory requirements when the statutory forms themselves often fall short of providing effective legal solutions. You are

effectively throwing your money away if you rely on an online Will preparation service.

‖ *Pre-Printed Forms*

Many pre-printed Will forms look official. Often they are handed out by a charity seeking a donation, with a gift to the charity printed into the form. Many of these forms are legally defective.

The worst case involved a form that failed to provide for witnesses. It was typewritten, yet un-witnessed. Look back at the two varieties of modern legal Wills: a holographic Will must be handwritten; a typed Will must be witnessed. the pre-printed from did not satisfy either category; hence it was not a valid Will (even though it looked proper to the untrained eye).

Be cautious of Wills prepared by the Judge Advocate's office at a military base. While these are often well done, they are sometimes inappropriate. The military's attorney may not be licensed to practice law your state and likely has a large case load. They rely heavily on forms recommended by others and the result can be a poorly drafted and unenforceable Will. In addition, JAG will not prepare a Will with any type of trust, especially the type of shelter trust often used to reduce federal estate taxes or testamentary trusts to protect beneficiaries. For that, you need to hire an independent licensed attorney.

Wills Written by a Notary Public

Never rely on a notary public who is not also an attorney to prepare any legal document. A notary's only job is to notarize already prepared documents, administer oaths, and make certified copies of documents which cannot be publicly recorded (like letters or business accounts).

Notaries are not required to have any special training or legal education. In order to become a notary, a person must simply apply to their Secretary of State, pay a filing fee, and get a surety bond. They are not qualified to practice law, and are in-fact legally forbidden to practice law unless that Notary is also a licensed lawyer.

Confusion may arise in different parts of the country based on local legal history. In Texas, confusion comes from Texas' Mexican history. In Mexico, a notario publico must also be a lawyer and must have a law degree. In Texas, it is illegal for the phrase "notario publico" to be used by a notary. It is misleading, and is considered a "deceptive trade practice" as well as a Class A misdemeanor.

If a Texas notary claims or even implies that the they are an attorney (unless, of course, the Notary is in fact licensed to practice law) it is a Class A misdemeanor. Beyond that, if a notary asks for or receives payment for preparing legal documents or for representing someone in a judicial or administrative proceeding, it is a Texas Class A misdemeanor. A second conviction of any of these deceptive acts is treated as a third-degree felony.

Testamentary Trusts

A testamentary trust can be included in a Will to extend the Testator's control many years into the future. Unlike a Living Trust, which is executed during the lifetime of the Grantor, a testamentary trust is integrated into the Grantor's Will and sits dormant until they die. When they die, it is activated to fulfill the Testator's goals, which can be as varied as the purposes of a Living Trust discussed earlier. Here are a few of the more common uses for a testamentary trust:

... for minors

Perhaps a share of the estate meant to pass to minor children or grandchildren. That share can be left in a testamentary trust to protect the money from waste and provide for the minor until adulthood. The inheritance can be used for college education, health care and to launch the minor's adult lives. Sometimes the inheritance can be constrained under an account governed by the Uniform Transfers to Minors, but doing so is a shortcut that eliminates a great deal of planning flexibility.

... for a spendthrift

Perhaps an adult child has awful money-handling skills, they are a spendthrift. If part of the estate passes to them without any constraints, it may be the same as throwing away the funds. Instead of disinheriting that person, their inheritance can be passed into a testamentary trust with particular rules

for accessing and spending the money. The trust and Trustee will help preserve the inheritance for many years and can ensure that the spendthrift's basic needs are provided for into the future.

... for asset protection

Perhaps an adult child and their spouse are not on the best of terms. If they divorce, a wall separating the in-law from the inheritance can protect the child and their assets and prevent their former spouse from taking the money intended as a gift. A trust can provide that protection, since the adult child does not actually become the owner of the inheritance. The Trustee owns it for the benefit of the adult child. If there is a divorce the inheritance is out of reach.

... for a disabled heir

Perhaps a disabled heir currently receives Supplemental Security Income or Social Security Disability Insurance. A testamentary trust can be constructed as a SPECIAL NEEDS TRUST to preserve these government benefits while allowing the heir to benefit from the inheritance.

... to split benefits between a second spouse and the children from prior marriages

Perhaps the testator is in a second (or third, or fourth marriage). Often, they are faced by conflicting testamentary wishes where they want to both provide for their new spouse and also provide benefits to their children from a previous marriage.

A testamentary trust can facilitate these needs by setting aside assets for the spouse's benefit so long as they are alive, and requiring that those assets are passed to the children when the surviving spouse dies.

... to save taxes

The federal estate tax system includes an "exemption amount" designed to reduce your final tax bill. With a testamentary Shelter Trust built into the Wills of a married couple, they can double the amount of the exemption.

COMMUNITY PROPERTY AND ESTATE PLANNING

Community property states present a unique challenge to estate planning professionals. Fundamentally, community property is intended to share ownership and management of the community property between married spouses. The community property regime has not always been smooth, however. Historically, it thwarted attempts by married couples to create survivorship arrangements for community property. When one of the spouses died, title could only pass to the survivor through a Last Will and Testament.

Every community property state handles community property survivorship differently. Current Texas Community Property Survivorship law, which was put into place with an amendment to the Texas Constitution

in 1987, authorized Texas residents to create a Community Property Survivorship Agreement ("CPSA"). Similarly, Washington State law allows a married couple to create an Agreement as to Status which allows Washington residents to jointly enter into an agreement concerning the status or disposition of their community property. For the sake of brevity, we will focus on the Texas law.

Texas Community Property Survivorship Agreements

In Texas, a CPSA is a non-traditional approach to estate planning which passes community property to the surviving spouse without the need for probate. A properly written, signed, and filed CPSA simplifies the complex tasks faced by a widow or widower. A Will is still necessary to cover issues that the CPSA cannot address.

Most married couples with assets below the estate tax exemption amount should consider a CPSA. Be aware, however, that there are circumstances where a CPSA is not appropriate and a Will is necessary for depth of planning. A CPSA cannot accomplish the following:

- It cannot pass title to any separate property. However, Texas spouses may convert separate property into community property;
- It cannot name a "backup" heir if there is no surviving spouse;
- It cannot pass assets to someone other than the surviving spouse; and,

- It cannot reduce estate taxes if your estate is larger than the exemption amount.

If those do not apply to you, then a CPSA may be a good tool to help you avoid probate on the first death of either you or your spouse. When properly written, a CPSA streamlines the post-death process and will save you time and money.

‖ *Formalities*

The Texas Estates Code contains exact parameters the creation of a CPSA. A CPSA is a contract between two spouses, both of whom must sign the agreement which should be prepared by an attorney. After signing, it must be filed with the county clerk in all counties where the couple own real estate.

‖ *Procedures upon Death*

Probate of a CPSA is not ordinarily necessary. The agreement passes title to community property immediately upon the death of the first spouse without any further action. It works to keep the estate out of court, most of the time. But, it is not absolute.

After the death of a spouse, the survivor can optionally apply to the court for an order stating that the agreement satisfies the requirements of law. Then, if a dispute arises, the probate court can guarantee validity of the agreement. Once an order is signed, anyone supposed to deliver property to the survivor may do so without hesitation.

In a very few instances, stubborn and out-of-date title company examiners refuse to accept a CPSA after the death of the first spouse. This is particularly frustrating as they are ignoring well-established Texas law. Typically, in these circumstances they will ask for an "Affidavit of Heirship" to bolster the spouse's claim to legal ownership. The surviving spouse can challenge the title company and can even obtain a court order forcing the title company to accept the CPSA. But, it is often less expensive to give in to their demand for an Affidavit of Heirship.

Concerns for Owners of Real Property

People who own real property, such as a home, particularly need a Will or other legally binding estate plan.

You Own Your House Even if You Have a Mortgage

Some people think they do not actually own their home because they have a mortgage. They are wrong. When most people buy a home, they need to borrow money to pay for it. At that point, the transaction is between three parties: the seller, the buyer, and the lender. In exchange for full payment of the home's value, the seller signs a Deed making the buyer the new homeowner. In order to get the money to pay the seller, the buyer borrows the purchase money from the lender. The lender requires

the buyer to sign a Promissory Note and a Deed of Trust (which is the legal name for what people colloquially call a mortgage). At that point, the buyer owns the home subject to a lien from the lender. If they default on their mortgage payments, the lender may foreclose on the house recoup their investment. The buyer is the owner of the real property; the lender is simply a lien holder.

Why Homeowners Need an Estate Plan

When the owner of real property dies, there is no automatic legal process to establish the identity of the new owner. The legal proceeding to establish ownership for the owner's heir, even if the heir is a surviving spouse, can be slow and expensive if there is no Will or other legal plan to transfer title.

When one spouse dies, the survivor does not automatically continue as sole owner of the entire home. For example, in Texas, when a husband and wife own a home the deed, almost universally, names them as joint tenants and their ownership interest is held as community property. Conversely, the deed, almost universally, does not contain any wording about what will happen when one of the spouse-owners dies. True, the laws of intestate succession provide a solution, but it is slow, complex, and expensive. Those who are unmarried should be just as deeply concerned.

A Will or other legally binding estate plan makes the outcome of the death of a landowner predictable and achievable. If you own a home, you should have a Will or other legally binding estate plan that states to whom

you want your share of the house to pass if you die. Period.

Plan for Digital Assets

The concept of "digital assets" is fairly new, much less the issues of who owns the digital assets, who should benefit from them, and how they should pass after the death of the owner. Consider photographs saved to an online service provider such as Facebook, OneDrive, Google Drive, Dropbox, or iCloud. These digital photographs are a valuable asset and an important part of a person's possession and estate. If the service deleted them, a valuable asset would be lost. Some people have their own website. The domain registration is a digital asset. Other people have stored years of correspondence in an email account. All of those records are digital assets. Still other people have spent hundreds, if not thousands, of dollars on digital assets such as Kindle eBooks, Xbox Live video games, and Amazon Prime movies and videos.

If disability or death strikes, all of those digital assets should be available to the Agent or Executor.

The concept of granting management rights for digital information is not something most attorneys include in Wills; only attorneys who are aware of the problem even know to address it. When appropriate, it makes sense to authorize the Executor to have access to the Testator's digital files and online files, their computer,

their bank log-in credentials, their brokerage log-in credentials, etc.

Facebook Legacy Contact

Until recently, when one of Facebook's 1.5 billion plus active users died, the account was simply put into "memorial" mode and locked against future use. In order to avoid this, many people shared their log-in credentials with a trusted person (like their spouse, child, or Executor) expecting that person to log-in and manage (or download) their profile upon death. However, sharing log-in credentials is technically a breach of the legal contract you enter into with Facebook when you become a user.

Memorial mode was dissatisfying to many of its users. Facebook has thus implemented a new procedure. Users may now designate a "legacy contact" in case of death. If no legacy contact is selected, then after the user's death that Facebook page can only be accessed by the "digital heir" named in the Will.

The Microsoft Approach

Microsoft's terms for its file sharing service OneDrive specify that the account holder owns all the content saved by that person on their servers. If a person has the log-in credentials, they may access the digital assets.

You may share your Microsoft log-in credentials and preserve your digital content after you die.

Google Inactive Account Manager and Delegates

Google now allows account holders to select one or more people to access their account, they can create a Google delegate. Also, users can avail themselves of the "inactive account manager" feature, which allows the user to designate a time period of 3, 6, 9 or 12 months. If the user does not access the account in that period then Google either 1) notifies the user's delegate that the account has been inactive, and the delegate may then access the account, or 2) Google deletes the account if the user instructed them to do so.

Digital Asset Management

For the broadest safety, consider including provisions in a Durable Power of Attorney which grants management rights for digital information to your Agent and Executor. If you become disabled or when you die, you may have incoming emails, orders placed with an online merchant, and bank accounts with digital statements available only online. Grant your Agent and your Executor specific power to access those digital assets, and make a password bank that your representative can access.

PART 7: Estate Taxes

History

The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") threw the entire estate tax system into confusion when it scheduled the repeal of the estate tax, the gift tax, and the generation skipping tax at the end of 2009. This meant that for the first time since 1916, the estates of people who died in 2010 would not need to pay a federal estate tax. To further complicate matters, EGTRRA included a sunset provision in which the estate tax exemption would be automatically reinstated in 2011 at 2001 levels of $1 million per person. It seemed that if you were wealthy, 2010 would be the year to die.

The next decade was an unpredictable roller coaster ride. When 2010 finally arrived, Congress had failed to plug the 2010 estate tax loophole. Instead, Congress implemented highly complex new carryover cost basis provisions that meant heirs could be forced to pay more in capital gains taxes on inherited assets than they would have owed under the old, pre-EGTRRA, estate tax regime.

In December 2010, Congress managed to come to a compromise where they reinstated the estate tax. This time, with an exemption of $5 million per person.

Families of people who died in 2010 could choose whether to implement the 2010 or 2011 estate tax rules.

The American Taxpayer Relief Act of 2012 made many of the Bush-era tax cuts permanent and implemented some new rules. Here is how it changed the estate tax:

1. There is now a permanent $5 million plus per person exemption from estate taxes, which is indexed to grow with inflation. For the first time in over a decade, the law gave Americans the chance to make an estate plan with predictable tax effects.
2. The $5 million plus exemption is portable. A married couple can avoid tax on twice the exemption amount if they make the proper elections and file the correct return with the IRS.
3. Once an estate exceeds the applicable exemption amount, estate tax will be due at 40% (a reduction from the 50% which would have been imposed if the new law had not passed, but an increase from the 35% rate in 2012).

Most of the examples in this book use an exemption amount of $5.45 million (the 2016 allowance).

Here is a chart that lists the history, past and current, of the exemption amount:

Table 1: Comparison of Exemptions for an individual				
Year	The 1997 Tax Act	The 2001 Tax Act	The 2010 Tax Act	The 2012 Tax Act
1998	$625,000			
1999	$650,000			
2000	$675,000			
2001	$675,000			
2002		$1,000,000		
2003		$1,000,000		
2004		$1,500,000		
2005		$1,500,000		
2006		$2,000,000		
2007		$2,000,000		
2008		$2,000,000		
2009		$3,500,000		
2010		No tax ($0)		
2011			$5,000,000	
2012			$5,120,000	
2013				$5,250,000
2014				$5,340,000
2015				$5,430,000
2016				$5,450,000

UNLIMITED MARITAL DEDUCTION

The Unlimited Marital Deduction ("UMD") eliminates estate and gift taxes on ALL transfers to a surviving

spouse. To calculate the size of the deceased spouse's taxable estate, first deduct anything left to the surviving spouse.

For example:

Tip and Norma, married for 46 years, have acquired a joint estate of $7.5 million. When Tip dies, he leaves his entire half to Norma. She does not pay any estate tax on the transfer because the Unlimited Marital Deduction eliminates the tax. She gets the entire $7.5 million.

The UMD is automatic. A testator does not need to mention it in their Will; simply leaving an asset to the surviving spouse (as long as it is a no-strings-attached, outright inheritance) invokes the tax-deferral granted through the UMD. A bequest to the surviving spouse that has conditions (like a gift to a testamentary trust) does not qualify for the marital deduction unless certain rules are followed.

The marital deduction has no dollar limit, which is why it is called "unlimited". This sounds simple and one is tempted to look no deeper. Realize this: the UMD *is not a tax reduction; it is only a tax deferral.* Remember, someday that surviving spouse will die – and then there is no Unlimited Marital Deduction. Their heirs will need to pay estate taxes on the entire estate, unless the surviving spouse managed to reduce the estate below the exemption. In order to avoid unnecessary taxes, the married couple must avail themselves of PORTABILITY of the deceased spouse's unused exclusion.

United States v. Windsor: Same-Sex Spouses and the Unlimited Marital Deduction

The Windsor case[47] dealt with a same-sex couple who were denied the estate tax exemption even though they were legally married in Canada. Edith Windsor and Thea Spyer were residents New York. In 2007, they travelled to Ontario, Canada where they were married in their 70's, after having spent most of their lives together as a couple. Spyer died two years later, in 2009, from multiple sclerosis. Spyer died relatively wealthy, and her Will left her estate to Windsor, and appointed Windsor as her Executor.

The IRS refused to grant Spyer and Windsor the unlimited marital deduction, basing their decision on the Defense of Marriage Act ("DOMA") which defined marriage as a union of one man and one woman for federal administrative purposes. As such, the Spyer estate was required to pay, and Windsor did pay, hundreds of thousands of dollars in federal taxes. If they had been opposite-sex spouses, the Windsor estate would have been able to use the unlimited marital deduction and no taxes would have been due. Windsor sued, alleging that DOMA violates the equal protection provisions of the U.S. Constitution.

[47] United States v. Windsor, 133 S. Ct. 2675 (2013)

The U.S. Supreme Court found that Section 3 of DOMA was unconstitutional. The federal government was required to recognize the validity of same-sex marriages on equal terms with opposite-sex marriages (the ruling did not apply to State-sanctioned "civil unions" or "domestic partnerships", only to laws that provide full status as married spouses). Thus, the UMD applied to Spyer's estate, and Windsor was due a substantial tax refund, as well as establishing an important civil rights precedent.

The IRS later issued Revenue Ruling 2013-17, which announced that all provisions of federal tax law would treat same-sex and opposite-sex married couples equally. The same equality applies nationally since the U.S. Supreme Court's subsequent *Obergefell* decision on marriage equality.

Portability of the Estate Tax Exemption

Every individual, whether they are single or married, is entitled to a $5.45 million exemption from the federal estate tax (2016 figure). That means a married couple has two exemptions; spouse A has a $5.45 million exemption and spouse B has a $5.45 million exemption. Federal law now provides that one spouse may receive both spouses' exclusion, for a total of $10.9 million, under certain circumstances. This is called "portability" of the exemption.

In order for the surviving spouse to claim both exemptions, the deceased spouse's Executor must file an estate tax return shortly after the first spouse dies (even if the estate is below the taxable threshold). On that return the Executor must elect to add the unused portion of the first spouse's exemption to the second spouse's exemption.

Giving the exemption to a couple rather than an individual simplifies estate tax planning for most married Americans. It does leave one major risk: the couple's estate plan may be outdated and consequently use an outdated, unnecessary, and burdensome trust arrangement in an archaic attempt to reduce estate taxes.

The Pre-Portability Approach

If a Will was signed before 2010 and contains a reference to a tax savings trust, it may need to be updated. Before portability, many married couples sheltered two exemption amounts from estate tax using a "Shelter Trust" (which may also be called an "A-B Trust", a "Bypass Trust", or a "Federal Credit Trust" depending on who you ask). A bypass trust worked because, essentially, it bypassed the surviving spouse and gave the first spouse to die's portion of the marital estate to a subsequent heir, such as a child, in trust. The surviving spouse was allowed to use the money in the bypass trust for their health, maintenance, and support, but they did not have free access to it. Since the survivor did not inherit those assets, the Unlimited Marital Deduction could not be used, which means the transfer

to the trust is taxable. That tax is then avoided by using the Exemption Amount of the deceased spouse. The survivor's taxable estate is left much smaller, as it does not include the amount transferred to the trust. When the second spouse dies, the Exemption Amount of the second spouse reduces or eliminates estate taxes on the non-trust assets.

> Here is an example of how a bypass trust worked:
>
> In 1998, Jack and Alice executed reciprocal Wills. Jack and Alice had assets valued at $900,000, which at that time would have been subject to a 50% estate tax for everything over the miniscule and aggressive $625,000 exclusion. Also, at that time, the law provided that any assets left directly to the surviving spouse were not subject to the tax upon the death of the first spouse (the UMD).
>
> If their Wills had bequeathed all assets to each other, then when the first spouse died, their estate would not be subject to a federal estate tax because of the UMD. The surviving spouse would then have an estate of $900,000. If the second spouse died six months later, leaving the estate to their child, the first $625,000 was estate tax-free. The remaining $275,000 would be taxed at 50%, so $137,500 would be lost to the estate tax. Only the surviving spouse's exclusion was used, the first spouse's was wasted. This was undesirable and expensive.
>
> To avoid this huge and unnecessary tax, Jack and Alice's attorney included bypass trusts in their 1998 Wills. This required that when the first spouse died, their share of the estate ($450,000) would pass to the trust, which then used the deceased spouse's tax

> exemption to zero out the estate tax. The UMD would not be used. The second spouse would then be able to use their remaining $450,000 freely, and they maintained the right to collect on the income of the $450,000 in the bypass trust as well as using the principal for health, maintenance, and support.
>
> If Jack died shortly thereafter, Jack would have used the Trust to handle his half of the estate. Thus Alice would have $450,000 in her own name and the other $450,000 would be in trust, which would not be part of Alice's taxable estate. To further the hypothetical, let's say that Alice died six months later, leaving her estate to their daughter. Daughter would get $450,000 from Alice tax free because of Alice's tax exemption, and daughter would get $450,000 from Jack's trust, tax free because of Jack's tax exemption. In this situation, Jack and Alice were able to completely eliminate their estate tax burden through the use of a bypass trust, but it was a complex and burdensome process that limited Alice's ability to use the estate.

Jump forward to the present when the federal estate tax is far less aggressive. We now have a permanent tax exemption of $5.45 million (adjusted each year for inflation).

Jack and Alice should meet with their lawyer to review and revise the bypass trust provisions in their Wills. If they do not, their Wills require the bypass trust to receive half the assets when one spouse dies, even though the tax which motivated that structure no longer exists.

> If Jack dies now, and his Will still contains the wording that requires half the assets to go into the bypass trust,

then he is still bypassing giving the estate to Alice. She owns only her half of the estate ($450,000) and Jack's half will go to the trust. This is undesirable, expensive and unnecessary, because from a tax perspective the entire $900,000 estate was going to be free of estate tax anyway (due to the current $5.45 million exemption amount). Regardless of the lack of need, the Will requires Alice to segregate those funds into separate accounts, get a new tax ID number for the trust, and file an annual return for the trust. She can use the funds only for her health, maintenance and support.

Jack and Alice should make new less complex Wills to eliminate their bypass trust and leave everything directly to each other. When one spouse dies, there is no estate tax because of the UMD. The surviving spouse now has free access to the entire estate, free of estate tax and free from trust. When a bypass trust is no longer needed to eliminate taxes, it should be eliminated from an estate plan. The burdens and restrictions imposed by the trust are no longer necessary.

"QTIP" Planning

People in a second marriage with children from the earlier marriage may have conflicting estate planning goals. They may want to protect the children from the previous marriage, they may also want to provide for the second spouse, and they may also have children with the second spouse. Their spouse likely has different goals. This is especially meaningful when the new

spouse has children by a prior marriage. Some are wary of leaving assets to the new spouse because that spouse's kids may benefit instead of their kids.

All of these contradictory needs can be satisfied through the use of a Qualified Terminable Interest Property ("QTIP") trust. "Terminable" means that ownership stops with the passage of time or on some particular event (like the death of your spouse.) "Qualified" means that the gift is not subject to extra taxation.

A QTIP trust allows one spouse to leave assets in a trust for the second spouse with a requirement that when the surviving spouse dies the assets must go to the first spouse's kids. This way, the second spouse is cared for during their life and the first spouse's children receive their estate when both spouses die. The trust keeps stepchildren at arm's length.

An ordinary inheritance received by a spouse (that is, one that is not terminable) is tax-free due to the unlimited marital deduction. A terminable transfer does not get to use the UMD; gift or estate taxes will be due. However, the "qualified" part of a QTIP means that the transfer qualifies for the UMD. Hence, *qualified* terminal interest property bears no estate tax when the first spouse dies, but is included in the taxable estate of the second spouse when they die (and hopefully, any resulting estate tax will be offset by the second spouse's lifetime exemption).

To be "qualified," the transfer must follow these rules:

1. The spouse must receive all income from the assets, payable at least annually;
2. No one may have a "power of appointment" (the ability to give away the property); and,
3. The Executor must notify the IRS that the assets are being treated as QTIP assets, if an estate tax return is required.

NON-CITIZEN ESTATE TAX MANAGEMENT

Resident aliens are subjected to the same estate taxes as their U.S. citizen neighbors, however non-citizens cannot claim the UMD. Congress feared that if estate taxes for non-citizens are deferred until the second death, the non-citizen would leave the U.S. in an attempt to avoid future estate taxes.

Legal resident aliens have three planning options to reduce estate taxes and avail themselves of the same estate planning options as U.S. citizens:

1. Resident aliens receive the same estate tax exemption amount ($5.45 million in 2016) as the U.S. citizens. Resident aliens should maximize use of this exemption to eliminate or lower estate taxes. If the resident alien's estate is less than the estate tax exemption, then this alone is enough to eliminate estate taxes.
2. Create a Qualified Domestic Trust ("QDT") as part of their Last Will and Testament. Under section 2056 of the Internal Revenue Code, a QDT can defer

estate taxes using the UMD. But, when the non-citizen spouse dies, estate taxes are payable. At least one trustee of the QDT must be a U.S. citizen or a domestic corporation. The non-citizen survivor may use any income generated by the QDT trust funds. The original assets put into the QDT when a spouse dies cannot be withdrawn by the non-citizen survivor except under special conditions.

3. Become a naturalized U.S. citizen.

STEP-UP IN BASIS

"Basis" is the dollar figure the IRS uses when determining capital gain tax on the sale of a piece of property. Basis is akin to the investment in an asset.

> For example:
>
> Myra bought 200 shares of stock in 1950 for $8 per share. Her basis is $8 per share (unless it is adjusted for depreciation or other reasons). When she sells the stock for $70 per share. Her taxable gain is that part of the sale price that was more than her basis (that is $70 - $8 = $62 gain.)

When a person inherits an asset, often the asset's basis is adjusted. The heir does not have the same basis as the original owner. Rather, the heir is allowed legally to increase the basis to the fair market value of the asset on the day the owner died.

> The fair market value of the stock on the day Myra died was $70. John inherited the stock. His basis in the

stock is reset to $70. Later, John sells the stock for $80 per share. His taxable gain is $10.

This can add up to significant savings when applied to many assets, and is referred to as a free step-up in basis.

Community property is given special favor. Even though the decedent only owned ½ of the community property, the entire balance is given a free step up in basis.

State Inheritance Tax

The *estate* tax is imposed by the Federal Government. Each individual state may also impose a local estate tax, sometimes referred to as an *inheritance* tax. Some states, like Maryland, impose both an estate tax and an inheritance tax.

The State of Texas once imposed an inheritance tax. It was abandoned in 2005 due to changes in the federal tax code.

The Washington State Estate and Transfer Tax Act imposes a state estate tax on transfers of property located in Washington after the death of a resident. As of this writing, estate tax returns are only due on estates with a gross value of $2.079 million or more, including in-state and out-of-state assets. The Act provides for a number of deductions.

If you are a Washington State resident and your gross estate is exposed, speak with your attorney to set up an

estate plan to minimize your Washington estate tax burden.

PART 8: Gifts as an Estate Planning Tool

Giving away valuable assets can be motivated in many ways: assisting a loved-one, helping a charity support an important cause, or shelter an asset from taxation.

Whatever the motive, be aware of the legal impact. For instance: gifts may be subject to taxes, gifts may disqualify the recipient or donor from receiving government benefits, gifts will not receive a step-up in basis, and the donor will certainly lose control of and benefits from the gifted assets. For the purpose of this book, we will focus on the tax ramifications of gift-giving.

Gift Tax Exclusion

Every citizen is entitled to give an unlimited number of gifts in any amount every year, however they are limited in the amount they can give tax-free to any one person. This limit is called the annual gift tax exclusion, and like the estate tax exemption it is indexed to inflation.

Annual Exclusion

As of 2016, the annual gift tax exclusion is $14,000, as indexed. What this means is that anyone may legally

give any other person up to $14,000 in any year without even thinking about paying a gift tax.

The exclusion covers an unlimited number of recipients. If a donor has three children and six grandchildren, the donor may legally give each of them up to $14,000 (for a total of $126,000) without worrying about gift taxes. The annual exclusion refreshes each calendar year.

In addition, there is an unlimited exclusion for gifts between spouses. Any amount transferred by gift from one spouse to the other is always free of gift tax.

Lifetime Exclusion

If a donor gives an individual more than $14,000 in a year (or $28,000 if SPLITTING THE GIFT with the spouse, see more on this in the next section) the donor must file a gift tax return. The donor then has the choice of whether to pay the gift tax or not. Most people prefer not to pay, and claim part of their lifetime gift tax exclusion. The lifetime gift tax exclusion is, actually, the same exclusion as the estate tax exclusion, so by using the gift tax exclusion to avoid paying gift tax, a person depletes their estate tax exclusion.

For example:

Mal owns a rent house that he wants to give to Kaylee. It is worth $65,000. Mal can deed it over to her in a single year. He will have to file a gift tax return showing that the first $14,000 was tax-free, and that the next $52,000 was taxable. Mal can then choose whether to pay the resulting tax, or to reduce his $5.45 million lifetime exclusion to $5,398,000. Not a hard

choice. However, when he died his estate tax exclusion will no longer be $5 million plus, indexed to inflation, it will be $5 million plus… minus the $52,000 he gave to Kaylee.

Split Giving

A married couple can combine their annual gift tax exclusion to double the amount which can be given to a single person in a year without gift tax. This is called "split-giving". It requires the approval of both spouses and the filing of a gift tax return.

For example:

Mal and Inara are in their second marriage and Mal has his own rather substantial estate. He also has three children and six grandchildren from his first marriage. On his own, Mal could give each one of them $14,000 each year. Inara likes his family but has no intention of giving them any gifts from her own funds. Mal can ask Inara to consent to a "split gift" to utilize the $14,000 that she could have given to his family. Mal then gives each child the extra $14,000 from his own money, for a total annual tax-free transfer of $28,000 to each of them. This costs Inara nothing, while at the same time that it increases the amount Mal can transfer tax free.

No Step-Up in Basis

Be warned that the recipient of a gift keeps the same basis as the donor. If the donor gives something that has capital appreciation, the recipient will owe capital gain taxes when the item is sold. If the recipient inherits the

item, the step up in basis rules apply and can eliminate, or at least greatly reduce, the capital gain tax.

Tuition & Medical Care

Tuition and Medical expenses are special exceptions to the annual gift tax exemption. A person can give an unlimited amount for these purposes, in addition to their $14,000 annual limit. However, to take advantage of this, special rules must be followed.

A tax-free tuition or medical gift can be given for anyone, whether or not they are a family member. However, the donor must pay the tuition directly to the school or pay the medical bill directly to the medical facility. The money cannot be given directly the student (or patient) expecting them to pay the bills directly. If the funds are put in any hands other than the school or medical facility, gift tax may be due.

For gifts of tuition, the student must be attending a school that maintains a full time faculty and has regularly enrolled students. The money can only pay for tuition. Any gift given to help pay for room and board, transportation or entertainment will count against the $14,000 annual gift exclusion.

College Savings Plans

Savings Bonds

Another way to help pay tuition is to buy U.S. Savings Bonds. Although this type of gift does count against the

$14,000 annual limit, the bonds can be cashed without paying income taxes under certain conditions.

The Education Savings Bond program allows certain U.S. Savings Bonds to be cashed-in tax-free. A "qualified U.S. Savings Bond" must be a series EE issued in 1990 or later, or a series I bond. The owner of the bond must be at least 24 years of age before the bond was issued (i.e., the parent owns the bond, not the student). Grandparents can only use this tool if the student qualifies as a dependent of the grandparent. Further, the whole program fails (tax is due on the bond's income) if the recipient's modified adjusted gross income is too high. Other conditions apply, so seek counsel from a tax advisor before taking action. If all necessary conditions are met, the interest is tax free so long as the funds are spent for qualified educational expenses.

Coverdell Education Savings Accounts

Contributions to Coverdell Education Savings Accounts are non-deductible and limited to $2,000 per year, but the accounts grow tax-free.

A Coverdell must be opened at a bank or other IRS approved financial institution, and the beneficiary must be under age 18. The person opening the account and making the deposits must have "modified adjusted gross income" of less than $220,000 for a couple or $110,000 for a single taxpayer.

Withdrawals from a Coverdell are tax-free so long as they are expended for qualified educational expenses.

Funds in a Coverdell can be used for college or for elementary or secondary education expenses. Tuition, fees, books, supplies, and equipment are qualified educational expenses. Room and board is also a qualified educational expense, but only if the student is enrolled at least half-time with the school. As with any program overseen by the IRS, other limits may apply.

Any money that is not spent for education becomes the property of the student when he/she reaches age 30, unless before that time the donor re-assigns the benefits to another family member under age 18.

529 Plans

"529" plans are sometimes called "Qualified Tuition Programs" or QTPs. Though authorized by federal law, 529 plans are created by the States and are typically administered under contract by a financial institution. All 50 States now offer them. Each State's plan is different and a financial counselor can help point to the right one.

To make 529 plans even more attractive, the Texas Legislature rendered them legally exempt from execution, that is, the money in a 529 plan cannot be seized to pay the donor's debts, even if there is a court judgment. Thus, 529 plans join other exempt assets like the homestead, life insurance, and retirement accounts.

A 529 plan has many advantages:

First, like an IRA, the earnings and growth are not subject to income tax.

Second, a 529 also allows tax-free withdrawals so long as the money is spent on qualified educational expenses. In addition to tuition, fees, books, supplies, equipment, and room and board, funds from a 529 can also be spent to acquire computer technology, equipment, and internet access when used while the beneficiary is a qualified student.

Third, although contributions to a 529 are not deductible, they can be made by a donor without reference to the donor's own income. The amount donated is limited only by the expected educational expenses of the future student.

Fourth, any funds contributed to a 529 plan are removed from the donor's estate for federal estate tax purposes. Once removed from the taxable estate, that amount will not be subject to federal estate taxes. This is true even though the donor retains certain powers over the funds. For instance, the donor has the right to reclaim the funds - but if reclaimed, the donor must pay the income taxes, pay a 10% penalty, and the funds are back in the taxable estate. In the same vein, contributions to a 529 plan are exempt from Medicaid transfer penalties, so long as the funds are first placed into a custodial account and then into the 529 plan. This is an opportunity for an aging grandparent to transfer funds in both a tax-favored and Medicaid-friendly manner.

Fifth, the donor can switch the 529 over to another beneficiary. If, for example, a granddaughter's college costs less than expected so there is money left in her

529, the grandparent can switch the account to a grandson (or to a future born grandchild).

Finally, the donor can contribute in an accelerated fashion. Federal law allows a donor to contribute 5 years' worth of the $14,000 gifts (that is, $70,000) in a single year. This can be doubled for a married couple.

UNIFORM TRANSFERS TO MINORS

A "UTMA" account is a custodial account set up under the Uniform Transfers to Minors Act. It allows a person to give a gift to a minor, but because a child cannot legally own the assets, a UTMA account names a custodian to manage and disburse the funds. In Texas, UTMA is part of the Property Code, in Washington State it is part of the Probate and Trust Code. UTMA is the replacement statute for the once familiar "UGMA" (Uniform Gifts to Minors Act). The newer act is more inclusive than the old, and extends the allowable length of the custodianship.

The custodian may give funds directly to the minor or may expend funds for the benefit of the minor (by paying the minor's expenses directly to a service provider, like paying college tuition). The custodian may expend funds in any manner that the "custodian considers advisable for the use and benefit of the minor."

The custodian need not consider whether or not the minor has other money that may pay for the current

need. The custodian need not seek a court order before expending funds, and need not take into consideration the duty of support that someone might owe to the minor (although the duty of support is not replaced just because the minor has funds in a UTMA account). Thus, spending the funds for food, clothing, shelter and medical care (even psychological testing) is legally acceptable. Income earned by a UTMA account is reportable on the minor's income tax return.

All funds held in the custodial account must be either retained in the form they were received or must be reinvested by the custodian in a prudent manner. There are some legal restrictions on the purchase of life insurance, and there is a legal requirement that the custodial funds be easily identified and separate from any other person's funds. The custodian also has the legal power to expend the funds for the benefit of the minor.

Perhaps the most negative of feature of a UTMA account is that it must terminate when the minor reaches age 21. Remaining funds must be put into the minor's control even though the 21-year-old may not yet have mature judgment. It is possible to use a 529 plan or to use a "Crummey" trust instead of a UTMA account. Talk with a qualified attorney and accountant to decide which option is best.

Gifting a Residence

Negatives of Gifting Real Property

Transferring ownership of a house to another person creates a number of legal issues. There are a wide variety of negatives. They include: 1) possible violation of the terms of the mortgage; 2) possible federal gift tax complications; 3) possible increases in capital gain taxes; 4) the great likelihood of a large increase in local property taxes; and, 5) possible disqualification from receiving Medicaid benefits. In more detail:

<u>Mortgage</u>. If the real property is subject to a mortgage, the Deed of Trust contract may (and probably does) include a “due on transfer” clause. The donor will have to seek permission from the mortgage lender to transfer title, and failing to do so would be construed as default that could subject the house to foreclosure. Even if they give permission, they may first ask the recipient to qualify on the same loan or to refinance. If the house if free of lien, there are no such restrictions.

<u>Gift tax</u>. A gift with large value (like a house) is subject to the federal gift tax. It is very like that such a gift will cause the need to file a form 709 with the IRS, but the donor may owe any taxes (depending on the exemptions available).

<u>Capital gain tax</u>. The recipient has the same tax basis as the donor. Assume the house was purchased for $90,000 and today it is worth $120,000. If the recipient sells it (without establishing that it is their “tax homestead”)

they will have to pay capital gain tax on the difference between the basis and the sales price. To avoid this tax, either a) the new owner must establish that the house has become their "tax homestead" by living there for two out of five years as owner, or b) the gift can be deferred until the time of death, allowing the intended recipient to receive title by inheritance instead of gift. Inherited property gets a free step up in basis.

Local property taxes. In Texas, if the owner is 65 or older, and properly filed for the exemption, then local property taxes are reduced due by the 65+ exemption and the school tax freeze. If the house is gifted to someone younger, the local property tax that is paid every year may double or triple in amount. If the Senior continues to own the house until death, the taxes stay at their current level until the heirs take title (only then do the taxes rise).

Medicaid. If title is transferred and later the donor needs to go to a nursing home, the transfer will likely disqualify the donor from receiving Medicaid benefits. If the donor cannot afford to pay for the nursing home on their own, the fact that title was gifted may mean that the government will refuse to help pay for the donor's long-term care.

A Better Approach to Gifting Real Estate

Due to those complicating factors, gifting a house may be the wrong approach. There is a different legal strategy sometimes available which eliminates the complications. Use a Living Trust or an Enhanced Life

Estate Deed arrangement (sometimes called a “Lady Bird deed”). A Living Trust or this type of deed can address the negatives and turn them to your advantage.

Under an Enhanced Life Estate Deed, the donor signs a deed conveying the property to the recipient, while retaining a life estate (a remainder interest) and the right to remain in the house. Then, so long as the donor is still alive, the house is still legally treated as the donor’s homestead. However, at the moment of death the donor’s interest expires and the recipient becomes full owner of the property. (They should talk with an attorney to prepare the correct next step to document their ownership of the property.) The transfer happens without the need for probate.

The complications of an outright gift are eliminated using an Enhanced Life Estate Deed.

First, the terms of the mortgage will not be violated as there is no ownership change during the donor’s lifetime. The security interest granted to the mortgage company is not violated. At the moment of the donor’s death, the property is transferred, but that would also happen through some legal process like probate and does not violate the mortgage.

Second, there is no gift tax consequence. Since the donor has retained authority to withdraw the remainder interest, there is no value to the remainder interest until the moment of death. Thus, there is no lifetime gift that would be subject to the gift tax.

Third, since the recipient does not actually own the house until the moment of the donor's death, they are awarded a free step-up in basis under the tax code. This eliminates the chance that they will be exposed to higher capital gain taxes due to receiving the house as a gift, if they decide to sell the house instead of living in it.

Fourth, the local tax assessor must legally continue to treat the property as the donor's homestead, and must continue to grant to the donor any due exemptions. The donor still has life estate in the property until the moment of death.

Fifth, since the donor retains power to reverse the transaction, in the eyes of Medicaid there has been no gift and no disqualification from benefits results. The key to this outcome is that no value is transferred until the moment of the donor's death. The house remains homestead for Medicaid purposes, exempt under the Medicaid rules. The bonus is that this type of deed currently protects the homestead against claims under the Medicaid Estate Recovery Program (MERP).

PART 9: Concerns for Pet Owners

Provide for Your Pet's Future

Pet owners are increasingly sophisticated about how they care for their animal dependents. A responsible pet owner has put a great deal of time and thought into providing healthy food and treats, safe toys and chews, adequate and proper health care, and a safe and enriching environment. Each pet is a member of the family, and the owner's responsibility continues even if the pet outlives them. The challenges faced by pet owners when providing care for your pet is impacted if the owner becomes disabled or dies. There are estate planning tools to overcome these challenges.

Despite scientific research that pets have a vast capacity for knowledge, understanding, and emotional empathy, the law still treats them like a piece of personal property. If an owner fails to make specific plans for a pet, the pet will likely be grouped in with the television, couch, and tea set and given to whoever is willing to take them. In many circumstances, this results in them going to an animal shelter where they will be condemned to a lifetime of imprisonment or uncertainty with only a small chance of a new loving home. With a small bit of pre-planning the owner can guarantee that all pets will go into a home where they will receive love and proper

care from someone who understands their particular needs and the important role they played in your life.

Immediate and Emergency Care

Pet owners should take a few simple low-cost steps to protect their pets and ensure that they will be cared for in the short-term in case of an emergency. Your pet is entirely dependent on you, so these emergency care solutions all focus on notifying emergency workers that you have a pet, informing emergency caregivers that your pet needs their attention, and providing short-term funding to cover food, transportation, and other necessities. In order to take proper advantage of these solutions, speak with your friends and family who live nearby to arrange an emergency caregiver for your pet. Keep an emergency stash of your pet's food in an easily accessible location.

Wallet Alert Card

An alert card is your first emergency measure. The card, carried in your wallet or purse, will notify emergency workers that you have an animal dependent and provide the workers with the necessary information to obtain short-term care for your pet. The card should include information on the pet's name, location, species, color, and likely hiding spots. It should also include information so the emergency worker can contact your emergency caregiver. At a minimum, this should include the caregiver's name and phone number. Also consider including their email address and home address. You can purchase alert cards from a number of

sources online or print one yourself. Laminate the card to protect it from wear and update it periodically.

Animal Emergency Document

An animal emergency document is a longer document you keep in an easily accessible place in your home. It contains additional emergency information about your pets that you could not include on your wallet card. Include your own contact information, all of the information on your alert card, and supplement it with additional necessary information about your pet's temperament, identifying characteristics, food and its location, favorite toys and games, medication, and medication instructions. Also include the contact information for your primary and emergency veterinarian and for your pet sitter or dog walker so that your caregiver can reach them if necessary.

ANIMAL PROVISIONS IN YOUR POWER OF ATTORNEY

A properly drafted and executed Durable Power of Attorney is your most powerful and versatile tool to safeguard your pets in case of an emergency. It will also serve as a bridge to transition your pets into your long-term care plan. Your Durable Power of Attorney grants your Agent the authority to manage your financial affairs and care for your property. When you speak to your attorney ask for a provision in your Durable Power of Attorney expressly authorizing your Agent to expend

funds on behalf of your pet. Otherwise, your Agent may not be able to provide for your pets if you become hospitalized, incur a long-term disability, or simply go on an extended vacation.

Your pets will need affection, exercise, and training while you are incapacitated and your Agent might not be able to offer it themselves. Append a copy of your Animal Emergency Document to your Durable Power of Attorney so your Agent does not need to search for the information. Your Agent may also need the authority to find a temporary foster home for your pet until your caregiver can be contacted, so consider a provision authoring your Agent to do so.

Finally, if you have already gone through the trouble of setting up an inter vivos Pet Trust, discuss with your attorney whether you should grant your Agent the authority to make contributions to your Pet Trust. If you have not yet set up a Pet Trust, discuss with your attorney whether you should grant your Agent the authority to create a Pet Trust on your behalf.

Informal Long-Term Planning

Historically, pet owners made informal arrangements with their friends and family to care for their pets. These arrangements, such as conditional gifts and bequests, often fail to carry out the pet owner's intent because they are not predictable or enforceable. Instead, pet owners should consult with their attorney to conduct formal planning and draft an enforceable Pet Trust.

You cannot give anything directly to your pet. Because animals are technically property, they are prohibited from owning property themselves. In order to provide for their pets and circumvent the limitations of animal care contracts, pet owners have attempted to attach strings to gifts (conditional gifts) and bequests in their wills (conditional bequests) in a futile effort to bind the recipient to use the funds to care for the animal. Conditional gifts and conditional bequests suffer from the same failing: they are unpredictable and lack an effective enforcement mechanism. Here a two examples:

> Hypothetical One:
>
> "I give my friend Earnest my home so long as he uses it as his primary residence."

By using this language to give a Conditional Gift, I have divided ownership of my house over time. Immediately upon signing the deed, I created a present possessory interest in the property which is held by Earnest and which he holds only as long as he continues to live in the house. I also created a "remainder interest" which I hold until I die and which then becomes part of my estate. If Earnest stops living in the house, ownership automatically reverts to me or to my heirs. While the reversion is automatic, I have to keep an eye on Earnest and the house to take back possession if he starts using the house for anything but his primary residence. This opens the door to arguments and a lawsuit if Earnest and I disagree over the facts.

If using this language to give a Conditional Bequest, I have given Earnest a future possessory interest that only takes effect when I die. After my Will is probated, my Executor must continue to monitor Earnest. If Earnest stops living in the house, ownership reverts to my estate and should be distributed to another heir identified in my Will. This also opens the door to arguments and a lawsuit if Earnest and my Executor disagree over the facts.

Hypothetical Two:

> "I give my friend Earnest my dog, Algernon, so long as he cares for him, as well as $10,000 to provide for Algy's care for the rest of his life."

This functions in a similar manner whether I include it in my Will or provide it as a gift to Earnest while I am alive. I have given Earnest two separate gifts: 1) my dog Algy and 2) $10,000 to care for Algy. For as long as I am alive and well, I can watch over Earnest to make sure he is caring for Algy and can take back Algy if necessary. But once I die, that responsibility falls on my Executor and heirs, who may or may not keep a close eye on Earnest. The gift of $10,000 is entirely separate from the gift of Algy, and Earnest will receive the money regardless of how well he cares for Algy, whether he keeps Algy, or how long Algy lives. Earnest cannot be compelled to use the money to support Algy, and in fact he has no obligation to keep Algy. Algy is now Earnest's property to do with what he wills. Earnest could, if he so wished, abandon Algy the day after receiving him and spend the money elsewhere. In such a circumstance, my heirs or I would be hard

pressed to recover anything from Earnest and Algy may suffer needlessly.

As you can see, informal planning is highly unpredictable. Despite this, conditional gifts and bequests can serve in ideal circumstances. A perfectly trustworthy caregiver does not require anyone watching over them to make sure they behave themselves. But, in the real world you cannot be certain that the person you select to care for your pet will do so without oversight.

This is not to say that conditional gifts and bequests are entirely unenforceable in real world circumstances. Over the course of history, sympathetic courts have upheld such gifts under a handful of legal doctrines, all of which required the assistance of an attorney and months if not years to resolve. A provision in your Will leaving your dog and money to a friend or family member could be effective. But your goals as a pet owner are to ensure a rapid and easy transition for your pet and to ensure that any money you leave them will be used to care for them. A Pet Trust is perfectly designed to do this.

PET TRUSTS

A Pet Trust is the best method to care for your pet and to make certain your instructions are fulfilled. The Pet Trust: a) identifies your pet and how they should be cared for, b) names a person to ensure they are cared for and to enforce the Pet Trust, c) identifies the pet caregiver, d) manages the assets and property to be

invested and used during the life of your pet, and e) distinguishes how these assets and property are to be distributed after your pet passes away. The major differences between a Pet Trust and a conditional bequest is that a Pet Trust must be administered until it is terminated and modern courts will readily enforce the terms of a Pet Trust.

Under the common law, Pet Trusts were generally overturned by the courts when disgruntled heirs challenged Mom's decision to leave the farm to the farm animals. The courts relied on two basic principles: 1) only a human could be the beneficiary of a trust because only a human beneficiary could sue a Trustee to ensure that the trust is properly enforced, and 2) the duration of a trust had to be measured against the life of a living named human being, such as the Grantor's grandchild. The former is called the Rule Against Honorary Trusts and the latter is called the Rule Against Perpetuities.

Those legal objections have been cured with legislation, so you can now create a Pet Trust without worrying that a court will dismantle it. Between 1990-2010, the National Conference of Commissioners on Uniform State Laws included an update to the Uniform Probate Code and the Uniform Trust Code to create a system where pet owners could provide for the care of their pets in the event of incapacity or death. As of 2016, 49 States (all except Minnesota) have enacted laws specifically permitting the creation of Pet Trusts. A knowledgeable Elder Law Attorney will be able to help you draft a Pet

Trust to ensure that it complies with state law and survives to protect and care for your pets.

Trust Provisions and Funding

When you meet with your attorney to create your Pet Trust, consider the lifestyle that your pets are accustomed to living and the sort of life you want them to lead when you are no longer able to care for them. Your Pet Trust can be as specific as you want. Keep in mind that the more conditions you create the more time and energy you will require from your Trustee and Caregiver. Your pet's lifestyle will also impact the amount of money and other property you should leave to the Pet Trust. Trust assets should be sufficient to provide for your pet's wellbeing throughout its life but not so excessive that your heirs would have grounds to ask a court to modify the trust.

Inter Vivos or Testamentary Pet Trust

There are two different types of Pet Trusts: inter vivos Pet Trusts and testamentary Pet Trusts, both of which contain largely the same provisions. The major difference is when the trust goes into effect and when it needs to be funded. An inter vivos Pet Trust is one that you create and fund while you are still alive. A testamentary Pet Trust is one that is created by your Will and is funded from your estate. Each ultimately serves the same purpose: to ensure that your pets are cared for according to your wishes and that the money you set aside to care for your pets is properly spent.

An inter vivos Pet Trust will care for your pet immediately. There is no delay when you pass away, the trust is already fully set up and funded so your Trustee can step in immediately to transport your pets to your caregiver and your caregiver will be able to immediately receive funds. An inter vivos trust, if properly drafted and maintained, will not impair your later eligibility for government benefits such as Medicaid. Amending an inter vivos trust is simpler than amending a testamentary trust because you will not need to execute an entirely new Will in order to make a small change. You should periodically update your Will however and can make the necessary changes to a testamentary Pet Trust at that time. On the other hand, inter vivos trusts require administration while you are still alive and must be funded immediately, extra work which is not strictly necessary. Note, as well, that you can choose to minimally fund an inter vivos Pet Trust and then include a pour-over provision in your Will to full fund it when you die. Nominal funding, at least, is required. A trust does not exist without any property.

Testamentary Pet Trusts, conversely, require no administration while you are still alive and, because the trust is funded by your Will, you do not need to fund it when you sign it. There may be a small delay in funding after you pass away while your Executor is probating your Will, but this delay will be minimal and you can direct your Executor to care for your pets during this period.

Grantor/Settlor

You are the Grantor of your Pet Trust. As long as you are alive you can modify or revoke your Pet Trust and you will have the ultimate authority over its implementation. You can also transfer assets into or out of the Pet Trust as needed and change the Trustee as required. After you die, an inter vivos Pet Trust becomes irrevocable and a testamentary Pet Trust is activated by probate of your Will.

Trustee

Your Trustee is charged with enforcing the terms of your Pet Trust. The Trustee is the linchpin who holds the trust together and differentiates it from a conditional gift or bequest. At a minimum the Trustee is responsible for managing the trust assets, distributing it to your Caregiver as needed, enforcing the trust provisions, and terminating the trust in accord with your state law and the terms of the trust. In addition, you can require your Trustee to periodically inspect the Caregiver's home and the care they are providing your pet to make sure it is up to the necessary standards. Your Trustee can also select an alternate Caregiver if your initial caregiver is unable to serve.

Because of this pivotal role, you should carefully select your Trustee and name one or two alternate Trustees to act if your initial Trustee is unable to serve. In a bind, a court can also select an appropriate Trustee. Your Trustee has a legal duty to administer the trust solely in the interest of the Animal Beneficiaries, and if they

breach their duty they can be held liable for their actions.

Animal Beneficiary

A Pet Trust can only provide for the care of an animal who was alive during your lifetime. These animals are collectively called the Animal Beneficiaries. You can designate particular animals by name, or you can elect to have the trust care for all animals in your possession when you pass away so long as they can be easily identified as your pets. Because enforceability and predictability are your goal, it is prudent to identify each Animal Beneficiary by name, species, gender, personality, and identifying marks and scars. If your pet is not already microchipped or tattooed, this is the perfect time to do so in order that your pet can be objectively identified. Careful identification also reduces the risk that your selected caregiver may attempt to replace your pet after they die with a similar animal in order to fraudulently continue receiving funds from the trust. Designate in the trust whether your Animal Beneficiaries must be kept together or if they can be split between different caregivers.

Include a Remainder Beneficiary in your Pet Trust who will inherit any assets left in the trust after all Animal Beneficiaries die. If you choose to make the Caregiver a Remainder Beneficiary, it is best to instruct the Trustee to not inform them. Otherwise, your Caregiver may choose to neglect your pet in favor of receiving the trust assets outright when the animal dies. Consider a provision in the trust instructing that the Caregiver will

only be a Remainder Beneficiary if they provide exemplary care for your pets. Other Remainder Beneficiaries can be your family and friends or charities you support. Consider this as an opportunity to give them one last gift after you pass away.

Selecting a Caregiver

Your Caregiver is the person who will take possession of your animals under the trust and provide day to day care for them. If you have many different types of pets, you may want select different caregivers for each of them. You may have been comfortable caring for your three dogs and your horse, but you may need to select a dog Caregiver and a horse Caregiver. Who you select as Caregiver is a deeply personal decision. Select someone who you are certain will love and care for your pets.

Texas Statutory Pet Trust

Texas Property Code[48] provides a formal method to leave funds for the animals' care. An owner can establish a Trust for the care of the pets (but only pets that were alive during the owner's lifetime; it is not legal, for instance, to set up a Trust for your dog and "any puppies born after" you die). Texas law says that

---

[48] HB 1190, 79th Regular Session, adding section 112.037 to the Texas Property Code

the trust must end on the death of the pets you had while you were alive.

What if an owner establishes a Trust in their Will and an "interested" person thinks they were overly generous to the pets, unnecessarily cutting into the money available to the human heirs? Texas law says that the Trust funds may be "applied to a use other than the property's intended use under the Trust to the extent the court determines that the value of the Trust property exceeds the amount required for the intended use".

In other words, leaving a million dollars for the care of a dog can be challenged in Texas, and the excess funds that are not realistically needed for the dog can be distributed to the human heirs named in the Trust instrument (or to the owner's heirs at law if the instrument is silent).

OTHER LONG-TERM PLANNING OPTIONS

If you live in Minnesota, or feel that a Pet Trust is not right for you and your family, you should consider an alternate plan to care for your pet after you pass away. Be advised, however, that each of these alternatives presents a significant limitation that is overcome by using a Pet Trust.

Conditional Bequest

We have already discussed the many drawbacks and few benefits of a conditional bequest in your Last Will

and Testament. If you choose to do so, you can leave your pet along with a specific amount of money to your elected caregiver. Remember though that the terms and limitations of a conditional bequest are largely unenforceable. But, if you live in Minnesota (which is the only state that has no statute authorizing Pet Trusts), a conditional bequest may be your only option for providing for your pet after you pass away. Pick a caregiver who you are certain will not need oversight and leave them an amount adequate to care for your pet and with enough left over to show your appreciation.

Animal Rest Homes

The other testamentary option is to make a charitable bequest to an animal rest home or pet retirement home. As pet owners age, entrepreneurs are establishing pet retirement homes where your animal can go after you die and where they will be cared for throughout the rest of their life. These sort of homes require an up-front fee and other compensation to care for your pet and are generally significantly more expensive than what it would cost if your pet lived in a private home, but they are an outstanding solution if your friends and family cannot care for your pet after you pass away.

WARNING: PET PROTECTION AGREEMENTS

Rachel Hirschfeld, a New York Attorney known for her work in animal law, has created a general purpose

document which she claims overcomes the limitations of contractual agreements and conditional gifts without the need to seek the advice of an attorney. She calls this document a “Pet Protection Agreement” and offers it for sale through her Limited Liability Company and LegalZoom. In a FAQ posted to her website (www.petprotectionagreement.org) she asserts that the Pet Protection Agreement is both a legal and enforceable contract in all states as well as a pseudo-trust. She also asserts that it is binding upon the pet caregiver, and that it can be created with minimal expense and without immediate funding.

It is the authors’ opinion that a Pet Protection Agreement is not an enforceable contract because it lacks mutual consideration, an essential element of all contracts. Mutual consideration requires that both parties exchange something of value, that they both incur some sort of burden (for example, when you hire someone to sit your dog while you are on vacation they provide a service in exchange for your money).

Ms. Hirschfeld states that funding the Pet Protection Agreement is optional and that if you do choose to fund it all of the money will be used for your pet. Yet, the pet owner offers nothing to the prospective caretaker in exchange for the caretaker’s time and energy. The Agreement is not a contract, and does not comply with various states’ laws.

A Pet Protection Agreement is also not an enforceable inter vivos Pet Trust. As we discussed above, an enforceable and properly executed Pet Trust has five

necessary elements: 1) a Grantor, 2) a Trustee, 3) a Caregiver, 4) a Beneficiary, and 5) trust assets or a mechanism to fund the trust. The Pet Protection agreement has a Grantor (you), a Caregiver (the "pet Guardian"), and the Beneficiary (your pet). Ms. Hirschfeld states, without reservation, that the Trustee (what she calls a "distribution representative") is optional, and can be the same person as the pet Guardian. In addition, she stresses repeatedly that funding the Agreement is optional and she fails to encourage the pet owner to execute a Durable Power of Attorney so that the Agreement can be funded if the owner becomes incapacitated or to place a provision in their Will so the Agreement can be funded during probate. Conceptually, the Pet Protection Agreement is a trust that lacks all the necessary elements to make a trust function or to be legally enforceable under the law.

Finally, Ms. Hirschfeld strongly declares that the Pet Protection Agreement is valid and enforceable in all fifty States. However, there is no such thing as a one-size-fits-all solution for any legal matter. Every State has different statutory law, and every state's court system has different binding precedent.

Ms. Hirschfeld's Pet Protection Agreement is a perfect example of the adage "the most expensive thing is a cheap attorney." The Agreement itself is inexpensive, but you, or more likely your pet, are going to pay for it in the long run. Avoid being drawn in by promises of easy fixes for legal issues. If you want to make sure your pet is cared for, talk to your attorney for personalized and targeted legal advice.

PART 10: Estate Planning for Gun Owners

Millions of Americans are proud gun owners. Proud gun owners often give thought to protecting their ability to responsibly own, transfer, and possess firearms. They do their best to protect themselves and their loved ones from the dangers inherent in possessing guns. They should also be concerned about unintended criminal penalties that may arise from traditional estate planning as they relate to illegal possession or transfer of regulated firearms.

Federal gun control laws provide a fairly comprehensive framework. But, take note, a state's laws may also significantly impact a gun owner's ability to take advantage of a Gun Trust to acquire, hold, and possess regulated firearms. A knowledgeable attorney in your area can help you understand the law and how to properly manage an NFA firearms in your estate plan.

Gun Control Act

Before covering estate planning for gun owners, it is important to review the federal firearms laws that make Gun Trusts necessary. The Gun Control Act (GCA) was enacted in 1968 to regulate firearms and firearm owners, dealers, importers, and manufacturers

throughout the United States. It is the most expansive law regarding gun control in the United States. It limits who can own, purchase, construct, and transfer firearms. The GCA is enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

After the mass murders at the nightclub in Orlando, many citizens are agitating for additional curbs on assault weapons. As of publication, Congress has not taken any action on this, even though the basic additional restriction would be to ban individuals on the TSA's no-fly list from acquiring weapons.

The U.S. Supreme Court has, however, refused to reverse lower court rulings that upheld restrictive laws in Connecticut and New York which were passed after the Newtown shootings. Those state laws forbid sales of assault weapons with large capacity magazines. Such a restriction under state law is not a violation of the 2nd Amendment.

Title I of the GCA addresses federal regulation of standard handguns and rifles. Title II of the GCA is known as the National Firearms Act (NFA). The NFA regulates machine guns, suppressors, short barreled rifles, short barreled shotguns, destructive devices, and "any other weapon" (including any weapon that does not fit into the previous categories in Title I and Title II, such as a firearm constructed to resemble an everyday item such as a smart phone). Weapons regulated by the NFA are collectively known as NFA firearms or Title II firearms - the terms can be used interchangeably. For more information on the NFA refer to the *ATF NATIONAL*

FIREARMS ACT HANDBOOK, an excellent resource published by the ATF to provide guidance to NFA firearms dealers and NFA firearms collectors.

Transfer and Manufacture of Title II Firearms

Transfer of possession, as defined by the NFA, includes "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of" a Title II firearm. Possession of an NFA firearm by someone other than the registered owner may be a transfer, even if neither the owner nor the possessor intended to transfer the weapon. The definition of transfer is very broad and leaves a great deal of space for you to get into trouble. Violating the NFA, regardless of whether it is willful or unintended, and whether possession is actual or constructive, could result in a felony conviction punishable by up to 10 years in prison and a fine of up to $10,000.00 for an individual as well as forfeiture of the offending firearm. Constructive possession could be as innocuous as your spouse having access to a safe where your NFA firearms are stored and knowledge of the combination or access to the key. Your spouse does not need to actually lay hands upon the weapon in order to constructively possess it.

In order to legally manufacture or transfer a Title II firearm, you must submit the proper paperwork to the NFA Branch of the ATF. Form 1 is used for the manufacture of a Title II weapon and Form 4 is used for the transfer of a Title II weapon. All transfers are subject to a $200.00 stamp tax which must be affixed to the

application in order for it to be processed. Willful evasion of the NFA transfer tax brings a fine of up to $250,000.00 for individuals and $500,000.00 for corporations and trusts along with additional jail time. State law may include further penalties. Specific requirements for transfer and manufacturing applications are discussed in more detail later in this chapter.

NFA TRUSTS

An NFA Trust is a special type of trust a gun owner can create (with an attorney's help) designed to handle the particular legal challenges of owning, using, and possessing restricted NFA firearms. Federal law defines a "person" to include entities such as trusts, which means that a trust can transfer, possess, and manufacture NFA firearms, with the proper filings. These trusts may be called NFA Trusts, Gun Trusts, Title II Trusts, Firearm Trusts, or Class 3 Trusts. The names can be used interchangeably.

Roles in an NFA Trust

Settlor

The Settlor is the person who owns the firearms prior to creation of the NFA Trust or the assets which will be used to purchase weapons for the trust, who hires counsel to create the trust, who selects the Trustee and Beneficiaries, and who decides the terms of the trust.

There is a long-standing debate over whether an NFA Trust should be revocable or irrevocable. Irrevocability means the trust is set in stone when the Settlor creates it. Revocability means the Settlor retains ultimate control over the trust. You can alter and amend a revocable trust to add additional Trustees and Beneficiaries and you can terminate the trust if necessary. The benefit of revocability is that the trust remains malleable; the drawback is that if you revoke or change the name of the trust without re-registering the weapons prior to revocation you are exposing yourself to potentially severe criminal penalties. Additionally, unregistered or improperly registered weapons cannot be transferred so your weapons may be confiscated. Irrevocability does away with this potential risk, but you cannot change the terms of the trust in the future. Whether you choose to make your NFA Trust revocable or irrevocable is a decision you should make only after consulting with your attorney.

Trustee

The Trustee administers the NFA Trust and manages the trust assets, including any NFA firearms owned by and registered to the trust as a fiduciary of the trust's Beneficiaries. Because of their unique position, only the Trustee(s) of an NFA Trust can use and possess the trust's NFA firearms unless the trust expressly states otherwise. Your NFA Trust should be drafted to give guidance to the Trustee regarding when and how the Beneficiary should be allowed to use one of the trust's NFA firearms, if the trust is drafted to allow the Beneficiary to do so at all. If your trust grants use of any

weapon to the Beneficiaries, the Trustee must be physically present and administering the benefits of the trust in order for a Beneficiary to legally use one of the trust's NFA firearms. The Beneficiary may never use an NFA firearm registered to the trust outside of the Trustee's presence.

The Trustee, as the individual with the power and authority with to manage the trust and its' assets, is the trust's Responsible Person, as defined by the NFA and the ATF. The Trustee must file with the ATF in order to transfer or manufacture an NFA firearm. If your NFA Trust has multiple Trustees, each of them must fill out and submit the necessary forms.

The Trustee must also stay abreast of changes in the law. The existence of a Gun Trust does not remove ultimate responsibility for your actions; even a well drafted trust does not remove criminal penalties for an illegal action. Your attorney is not likely to contact either the Settlor or the Trustee when state, local, or federal gun laws change. If firearms law does change, both the Settlor and Trustee should contact the drafting attorney to determine if the NFA Trust needs to be updated.

When a Settlor selects a Trustee or co-Trustees, it is important to note that while anyone over 18 years of age is legally capable of serving as Trustee of an NFA Trust, it is prudent for all Trustees to be over 21 years old so that they can carry out all their duties under the trust without limitation. Individuals under 18 years old are prohibited from lawful possession of handguns and

handgun ammunition, and anyone under 21 years old may not lawfully purchase handgun ammunition.

Beneficiary

The Settlor is free to name any non-prohibited person as a Beneficiary of a NFA Trust. In most trusts, a Beneficiary is the person who is entitled to benefit from the assets of the trust. They are also the person who will take ownership of trust assets after the trust terminates. In the particular circumstances of an NFA Trust, the beneficiary's role is not quite so clear-cut. The language of your particular NFA Trust will determine whether a Beneficiary can use one of the trust's firearms while in the physical presence of a Trustee. If your trust does not expressly allow this, then a Beneficiary of the trust should never be allowed use (or be in possession, whether actual or constructive) a trust firearm. To do otherwise would be a crime potentially subject to penalties.

Benefits of an NFA Trust

An NFA Trust is a living trust with many of the same provisions as a standard asset management trust. It will provide you with certainty and control for how your firearms will be managed and used, as well as limited circumvention of the highly limiting possessory provisions of the National Firearms Act. It will also provide greater privacy than if you personally own your Title II firearms and has certain benefits compared to probate of an estate that owns restricted weapons. Because of the unique requirements for managing

restricted firearms you should not use an NFA Trust to manage other types of assets.

Pseudo-Joint Possession

Federal law severely restricts who can possess a Title II firearm. Only a single person can possess a Title II firearm, and the firearm must be registered in that person's name. That person cannot transfer or allow anyone else to use their weapon without both the transferor (owner) and the transferee (user) committing a felony. NFA Trusts evade this prohibition and allow for pseudo-joint possession of the guns owned by the trust. What this means is that every Trustee, co-Trustee, and successor Trustee are all allowed to possess a weapon owned by the trust, and that the trust Beneficiaries may be able to possess a weapon owned by the trust when in the physical presence of a Trustee.

The legal rationale to support this requires some analysis. The weapons are owned by the trust and are part of the trust corpus. Trust law dictates that a Trustee is a fiduciary of the trust charged with the management of the trust corpus. The Trustee and co-Trustees must be able to possess the trust corpus in order to manage it and no "transfer" occurs when a gun owned by the trust changes hands between co-Trustees or when the Trustee allows a Beneficiary to temporarily use a weapon in their presence. In this way, an NFA Trust allows more than one person to legally possess an NFA firearm without effecting a transfer.

People with spouses and families gain particular advantage from an NFA Trust due to the risk of

constructive possession. Recall that with an NFA firearm, constructive possession could be as innocuous as your spouse having access to the safe where NFA firearms are stored and knowledge of the combination or access to the key, or as harmless as allowing a friend to use your hunting lodge where you store your NFA firearm. If anyone who can possibly possess your NFA firearm is listed as a Trustee in your NFA Trust, they may all legally possess the weapons without risk of committing a felony. The ability for multiple people to possess restricted firearms is the single largest benefit of an NFA trust.

Transfer and Manufacture

A trust does not have fingerprints and cannot have its picture taken. This meant that, historically, federal law did not require the Trustee or co-Trustees of an NFA Trust to submit fingerprints and pictures to the ATF or obtain the certification of the local Chief Law Enforcement Officer in order to acquire or build a Title II weapon. Instead, the Trustee only needed to submit the proper form including a copy of the Trust document itself so that the ATF could confirm the trust's existence. This was viewed as one of the primary benefits of an NFA Trust by many proponents, and was viewed as one of the major weaknesses in the federal gun regulation regime by gun control advocates.

On January 15, 2016, the ATF published Rule 41F which significantly alters the transfer and manufacture application rules for NFA Trusts. The Rule is designed to ensure that identification and background check laws apply equally to individuals, trusts, and other legal

entities. As of July 13, 2016 all applications must include a recent picture and fingerprint cards alongside proof of citizenship for the Responsible Person of the NFA Trust. A Responsible Person is anyone who has the power or authority to direct the management and policies of the NFA Trust to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a regulated firearm. Definitely, this includes the Trustee of an NFA Trust and may also include the Settlor and Beneficiaries, depending on the terms of the trust.

Prior to Rule 41F, all transfers of NFA weapons had to be approved (certified) by the local Chief Law Enforcement Officer (CLEO) in the gun owner's area. Rule 41F removes the CLEO certification requirement, replacing certification with a notification requirement. The Rule achieves a delicate balance. While it eases transfer requirements by doing away with CLEO pre-approval, it will also improve gun safety by requiring all responsible parties to undergo a proper background check. Traditionally, CLEO pre-approval could be granted or withheld without review, which led many to accuse local law enforcement offices of discriminatory abuse of power. Rule 41F may ease discriminatory and discretionary practices and enhance equal access to gun ownership.

While the Rule will markedly affect the administration of Gun Trusts in the future, it is not retroactive. Any Title II firearms already registered to Gun Trusts prior to July 13, 2016 will not need to be re-registered.

Continuity and Estate Planning

An NFA Trust owns any firearms registered to it. The lifetime of a trust is significantly longer than the lifetime of an individual human being, depending on each state's laws and the applicability of The Rule Against Perpetuities. Continuity provides unique benefits to gun owners. When properly drafted, an NFA trust can administer firearms long past the initial owner's natural lifetime and ease the transition of possession to the heirs.

Contrast this to dying without an NFA Trust. Probate of an estate that includes a Title II firearm has serious risks. The Executor is charged with carrying out the terms of the Will. Their job is to transfer all possessions to the heirs, which for any Title II firearms in the estate is considered a "transfer" and requires registration with the ATF. If the Executor or heir takes possession of an NFA firearm without filing the necessary paperwork both the Executor and heir may be in unlawful possession and could face criminal penalties. There could be significant additional complications for the Executor and heirs if the heir resides in a different state.

Rule 41F eases this burden on Executors. When it comes into effect on July 13, 2016 any Executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate may possess a firearm registered to the decedent during the term of probate without such possession being treated as a transfer under the NFA.

Specific Limitations of a Gun Trust

State and Local Law, Waiting Periods

As should be clear from the rest of this chapter, an NFA Trust does not allow anyone to avoid firearm regulation laws. The trust is subject to all state and local laws, and must adhere to all required waiting periods.

Interstate Transportation

It is illegal to transport an NFA firearm across state borders without approval of the ATF. An NFA Trust does not circumvent this requirement. Regardless of the number and domiciles of the Trustees, they must keep the NFA firearms in the state where the trust is located. In addition, while most gun owners create a gun trust to take advantage of benefits under federal law, the trust itself is governed substantially by state law. If you move to a new state, you may need to change the situs of your NFA Trust. The trust is not portable, so make an appointment to talk with an attorney in the new state before you move and make sure to organize all the necessary paperwork so that you do not violate state or federal law.

Prohibited Persons

A person prohibited from owning or possessing a firearm under federal or state law cannot circumvent this ban with an NFA Trust. A person who cannot legally possess a firearm also cannot serve as Trustee or Beneficiary of an NFA Trust. A prohibited person can,

however, be a Settlor of an NFA Trust. Nothing in the law prohibits them from contributing money or other assets to the NFA Trust to assist with procurement and management of NFA weapons which they are prohibited from possessing.

Take Particular Care in Drafting an NFA Trust

In most circumstances, the consequence of an invalid *non*-NFA Trust is simply frustration of the Settlor's purpose. The Settlor may have intended to pass property in a certain way or to establish a special needs trust to provide for a loved one in case of disability. In a *non*-NFA Trust, frustration of the Settlor's purpose may result in loss of government benefits, payment of additional taxes, or confusion about the ownership or inheritance of a particular piece of property.

In contrast, the consequences of an invalid NFA Trust are significantly more severe. Not only do the purposes of the trust fail, but the Settlor, Trustee and Beneficiaries could face large fines and extensive imprisonment alongside forfeiture of any offending Title II weapons.

Do not draft your own NFA Trust. Do not rely on a form obtained from LegalZoom or a similar resource. These documents are not tailored to your particular needs and you do not have the experience and knowledge to prevent drafting errors. One example a drafting error is the doctrine of merger. In any trust, whether NFA or non-NFA, the sole Trustee and sole Beneficiary must be

different people or the trust becomes invalid. If you hold both the right to manage and control, and the right to benefit, the trust no longer needs to exist. The rights merge and the trust collapses. It is as if you never created a trust in the first place. In this case, you could quickly find yourself in possession of NFA firearms registered to a non-existent trust and facing prosecution for a felony.

Gun owners put a great deal of thought into the management of their firearms. Naturally, a gun owner wants to preserve as much control as possible even after creating an NFA Trust. The best way to do this is to meet with a qualified attorney.

PART 11: Paying for Long Term Care

LONG-TERM CARE EXPENSES

One of the greatest financial risks faced by Seniors is the prospect of long-term care, whether in their own home with professional help, in assisted living, or in a skilled nursing facility.

The cost of care in skilled nursing facilities is steadily increasing. Paying for this care takes careful planning. To plan properly, a person must understand their options and their limitations. Private and government funding of long-term care imposes some limits and exposes some opportunities. A well thought out plan can save heartache and can save money.

There are three ways to pay for long-term care: privately, out of pocket or out of the family's pocket; through insurance; and, through public benefit programs.

Out of Pocket Expenditures

Paying out-of-pocket is mostly self-explanatory, but here are a few ideas to consider:

- Life savings is precious, and most people desire to leave some legacy to their children. At the same

time, “saving for a rainy day” would also have been a strong motive for creating those savings. If a person or their spouse needs essential health care, then the rainy day has arrived and there is no shame in spending those funds. Just be aware that a safety net exists in the form of public benefits, and one should never allow oneself to become completely impoverished before seeking help.

- Family members may volunteer to assist. Just as parents likely helped the kids after they turned 18 even though the legal obligation of support had ended, the adult kids may have a strong desire to help the parents in their time of need. Even so, there is no “filial responsibility” law in Texas that requires children to contribute to a parent’s support. Further, federal regulations forbid nursing facilities from requiring a guarantee from a family member as a condition of admittance[49].

Savings might take many forms. Consider the pros- and cons- of borrowing against the equity in your home as a way to pay for needed long-term care. Also consider tapping into the reserves that may exist in your life insurance program.

[49] 42 CFR 483.12(d)

Drawing on Life Insurance Reserves

A patient may have the option to borrow against the cash value of their life insurance policy, to take a life settlement, or to draw accelerated benefits. The first option is nothing more than a traditional loan. The policyholder owes the insurance company repayment of the loan with interest, and if the loan is not repaid before the insured dies, then the amount due is offset against the policy death benefit. The other two options are called "viatical settlements".

Viatical is from the Latin viaticus, *relating to a journey.* Thus, viatical settlement is a euphemism for "money that helps you on your journey" – that is, that assists prior to death. There are two types:

1. "Accelerated benefits" involve early payment of benefits, directly from the life insurance company, usually for people with terminal conditions and life expectancies of six months or less. Accelerated payment of insurance benefits is *not* available from all life insurance companies.

Some insurers add accelerated benefits to life insurance policies for an additional premium, usually computed as a percentage of the base premium. Others offer the benefit at no extra premium, but charge the policyholder for the option if and when it is used. In most cases, the insurance company will reduce the benefits advanced to the policyholder before death to compensate for the interest it will lose on the early payout. There also may be a service charge.

2. “Viatical settlements” involve selling the insurance policy to a separate company. The purchase is made for an amount less than the policy's face value, but more than the cash surrender value of the policy. The purchaser then makes all future premium payments (often there are none) and receives the death benefit. Each viatical settlement company sets its own rules for determining which life insurance policies it will buy. For example, some companies will require that:

- The seller has owned the policy for at least two years;
- The current beneficiary signs a release or a waiver;
- The seller is terminally ill. Some companies require a life expectancy of two years or less, while others may buy the policy even if seller’s life expectancy is four years; and,
- The seller must sign a release allowing the company to access to their medical records.

Proceeds from accelerated benefits and viatical settlements are tax-exempt[50] as long as the patient’s life expectancy is less than two years and the viatical settlement company is licensed.

[50] Internal Revenue Code, §101(g)

Texas regulates these licensed viatical settlement companies[51]. Whenever a policy exceeds $10,000 in value, any viatical settlement must provide that:

1. The proceeds be used for in-home care, assisted living or nursing home care, and must be paid directly to the service providers by the insurance company;
2. Five percent of the face amount of the life insurance policy or $5,000 (whichever is less) must be reserved and must be payable to the owner's estate or a named beneficiary for funeral expenses;
3. Any policy proceeds that have not been distributed must, upon the death of the policy owner, be paid to the owner's estate or a named beneficiary; and
4. Specifically state the total amount payable under the life settlement contract.

Before purchasing a policy, the company must provide a lengthy disclosure to the seller[52] which explains:

- That a viatical or life settlement may affect an individual's ability to receive supplemental social

---

[51] Section 32.02613, Texas Human Resources Code (HB 2383, 83rd Legislature)

[52] 28 TAC 3.1708

security income, public assistance and public medical services, including Medicaid;

- That the proceeds of a viatical or life settlement may not be exempt from creditors, personal representatives, trustees in bankruptcy, and receivers in state or federal court;
- That all confidential information solicited or obtained by the purchaser will not be disclosed in any form to any person without detailed prior written consent from the seller;
- That the seller has the right to rescind a viatical or life settlement contract any time during the first 15 days after receiving the funds. If the seller dies during those 15 days, the contract is deemed rescinded and the death benefits are restored;
- That the seller may wish to contact an attorney, accountant, estate planner, financial planning advisor, their insurer, insurance Agent, tax advisor, or social services agency regarding potential consequences resulting from entering into a viatical agreement; and,
- That the seller may file a complaint by contacting the Texas Department of Insurance, Consumer Protection Division Help Line at 1-800-252-3439 or by completing a complaint online.

Deducting Out-of-Pocket Nursing Home Costs

Federal law allows you to deduct “qualified long term care” expenses as an itemized deduction on Schedule A of your Form 1040. However, the deduction will only

save money when it exceeds 7.5% of your adjusted gross income.

Qualified long-term care expenses include diagnostic, preventive, therapeutic, and rehabilitative services when they are medically necessary. They also include personal care or maintenance services needed by a chronically ill person when prescribed by a doctor. This second definition includes nursing home care.

To be considered "chronically ill" a person must need significant assistance to perform at least two activities of daily living, such as eating, toileting, bathing, dressing, and moving from place-to-place. Alternatively, a person also qualifies if he/she needs constant supervision due to cognitive impairment in order to safeguard that person's health and safety. The illness must continue for at least 90 days to be considered chronic.

If you meet all these conditions, then you can take an itemized deduction for the cost of nursing home care.

Huse v. Texas: Controlling Liability

If a person is ill enough to move into a nursing home, they may not have legal capacity to make their own decisions. If so, someone who cares for the may handle the paperwork necessary to move them into the nursing facility. That paperwork usually involves a contractual agreement on liability for payment of the facility's monthly bill.

The person handling the paperwork should be the legally authorized Agent under the patient's Durable Power of Attorney. That Agent must be careful to sign documents in the proper fashion to avoid personal liability.

If the paperwork is signed incorrectly, the caretaker may become personally liable for the patient's monthly bill. A case decided in Eastland, Texas tells a story that illustrates the possible complexities. In *Huse v. Texas*[53], a mother became very ill and found herself in a nursing home. Her son (Mr. Huse) promised to take care of things for her. She had little income and few assets, so he filed an application to get Medicaid's help with her monthly nursing home bill.

It took many months before mother was approved for Medicaid, and then only because the nursing home administrator provided information the son failed to provide. Even after mom was approved for benefits, Medicaid only paid the part of her bill Social Security would not cover.

The nursing home asked Mr. Huse to pay the rest of the bill, and he agreed to take care of it. That was the moment things went wrong. He bounced a check, made more promises, and never actually paid the nursing

[53]Huse v. Texas, 180 S.W.3d 847 (Tex. App. – Eastland, 2005). Rehearing Overruled January 19, 2006.

home. The administrator eventually pressed charges against him for "theft of services". He was arrested, tried and convicted to two years in the state jail. He appealed his conviction on several technical issues, but the Court decided he had induced the nursing home to provide continued services by tendering his check.

The lessons of the Huse case are to 1) Keep responsibility where it belongs, and to 2) Keep responsibility with someone who is capable. Mr. Huse's mistake was to promise he would pay the bill when he did not owe the bill and did not receive the services. His promise was a contract, and his deception was found to be a criminal act.

Mr. Huse should have relied on his mother's Power of Attorney naming him as Agent. He should have told the nursing home his mother would pay the bill *through him, acting as her Agent*. The contract for services would have stayed with her, not him. Failure to pay the bill may have resulted in her eviction or in an accusation he was exploiting his mother or breaching his fiduciary duties by keeping her monthly income, but jail time was far less likely.

MEDICARE

Medicare was created by the federal government in 1965 and is managed on a national level by the Center for Medicare Services ("CMS," formerly known as "HCFA," the Health Care Finance Administration). Its management services are divided into two groups:

- The Center for Medicare Management focuses on management of the traditional fee-for-service Medicare program. This includes deciding how much medical providers will be paid, and managing fee-for-service contractors.
- The Center for Beneficiary Choices focuses on providing beneficiaries with information on Medicare, Medicare Advantage, Medigap options, and Drug coverage.

Medicare now offers several different programs.

Part A helps pay for hospitalization, short-term nursing home care, home health care and end-of-life hospice care. You do not pay a premium for Part A.

Part B is optional and costs extra. It helps pay the cost of physician care, some outpatient and lab services, and pays for some medical equipment costs. Parts A & B are "traditional" Medicare coverage.

Medicare Advantage (formerly known as Medicare+ Choice or as Part C) applies if a person opts out of traditional coverage. A variety of private care providers accept regular payments of Medicare in exchange for covering health care needs. These Health Maintenance Organizations (HMOs) and Preferred Provider Organizations (PPOs) may offer a wider range of services and lower co-payments than traditional Medicare, but the patient must use the plan's physicians and must deal with the plan's efforts to save money by skimping on patient care.

Part D is Medicare's prescription drug coverage, authorized by the Prescription Drug, Improvement, and Modernization Act of 2003 (MPDIMA). It is discussed more fully later in this book.

The Affordable Care Act (Obamacare)

The federal government has tried to reform the health care system several times. President Nixon proposed expanded national health coverage in 1971, but it did not pass into law. President Reagan signed the Medicare Catastrophic Coverage Act in 1988 and then signed its repeal in 1989. President Clinton established a Health Care Task Force in 1993 which failed to produce a new law.

When President Obama signed the Affordable Care Act in 2010, he did so to loud objections from many Americans. But the ACA is, in some ways, a very conservative law. It could have established a Canadian-style national health care system. It could have expanded the Medicare system, from those 65+ to all Americans. Instead, it uses private sector insurance companies to manage health care, requiring most Americans to buy their policies while providing premium assistance to lower income Americans.

║ *The ACA's Effect on Seniors*

In 2012, the U.S. Supreme Court issued a disjointed ruling that the ACA is Constitutional[54]. The U.S. House of Representatives has tried repeatedly and ineffectively to repeal the ACA. Yet the ACA remains, and in fact has *very little impact* on Seniors who are covered by Medicare.

It is ironic when Medicare enrollees accuse the ACA of being a socialist program and demand that Washington keep its nose out of health care. A person who is covered by Medicare is a part of the largest national health care program run by the government. Washington has been deeply involved in health care for decades.

According to the Center for Medicare and Medicaid Services (CMS) if a Senior is covered by Medicare, Medicaid, Tricare, or the Federal Employee Health Benefits plan, that Senior has no need to be concerned about the Health Insurance Marketplace established by the ACA[55]. When a Senior is enrolled in Original Medicare or a Medicare Advantage Plan, the Senior stays with his or her current plan under the ACA. The

---

[54] National Federation of Independent Business v. Sebelius, 567 U.S. ___, 132 S.Ct. 2566 (2012).

[55] http://www.medicare.gov/about-us/affordable-care-act/affordable-care-act.html

Senior does not need to buy private health insurance via the Health Insurance Marketplace website.

Under the ACA, Medicare's coverage for Seniors has actually expanded without the imposition of any new costs. The Federal Department of Health and Human Services summarizes the ACA benefits to Seniors as:

a) Reducing fraud and waste, which will extend the trust fund's financial health to 2024.
b) Controlling cost overruns in Medicare Advantage plans, which cost the taxpayers more than traditional Medicare.
c) New preventive health services like an annual wellness doctor appointment, assistance to stop smoking, and no deductible or copay for various tests (like mammograms, colonoscopies and diabetes screening).
d) The burden of the prescription drug "donut hole" is being reduced (more on this later in this book).
e) New Medicare enrollees get a no-cost "Welcome to Medicare" wellness visit with their doctor, and all Medicare enrollees receive a no-cost annual wellness visit with their doctor.

As part of this annual wellness visit, you should discuss your legal Advance Directives with your doctor. Ask how the doctor and hospital will react to your directives, and provide copies to your doctor. Avoid using forms supplied by your doctor, or any institution or person who is not a qualified Attorney because the forms those

places are distributing are likely to be of questionable legal validity. The doctor or doctor's staff cannot legally assist you to prepare Advance Directives because doing so would be unauthorized practice of law. Your doctor is not a lawyer.

New Taxes under the Affordable Care Act

The ACA created two new tax issues:

First, if an uninsured person fails to purchase health coverage, they will owe a penalty along with their income taxes. This was ruled Constitutional by the U.S. Supreme Court. The penalty is fairly small in the early years, and there are a number of exemptions. *Seniors covered by Medicare are considered insured, and will never be exposed to this tax penalty.*

Second, the ACA includes an increase in capital gain taxes. However, this tax applies only to taxpayers who have taxable income above $200k (for a single person) or above $250k (for a married couple). If income is below those levels, the taxpayer is entirely exempt from the new tax. For those higher income taxpayers who are exposed, the tax is equal to 3.8% of "net investment income".

The largest capital gain most people have is when they sell their home. We all pay taxes on our homes. Locally, we pay property taxes every year. On the federal level, our homes are subject to capital gain taxes when sold (after various exemptions are applied). These old taxes affect all homeowners, have been imposed for decades, and their legality is well established. The new tax

included in the ACA is also legal and will affect only a small minority of homeowners.

The new tax law continues to recognize that when a homestead is sold, the capital gain exemption is applied. Any single person selling a homestead may enjoy up to $250,000 in capital gain without having to pay capital gain tax. A married couple is exempt up to $500,000. When an exposed taxpayer sells a homestead and has investment income smaller than the capital gain exemption, the "net" investment income is zero and the new tax does not apply.

Thus, in order to be exposed to the new tax, two things must happen. First, the taxpayer must have annual income above the $200,000 or $250,000 limits. Second, the taxpayer must have a capital gain above the $250,000 or $500,000 limits. Here are a few examples of how the new tax would apply:

1. George is a single person, employed, and making $220,000 per year. He owns a home which he paid $300,000 to obtain. It is his primary residence and homestead, and he decides to sell. The market is good, and he gets an offer of $600,000 for the home. Step 1: His income of $220,000 exposes him to the new tax, since it is above the single person $200,000 limit. Step 2: His gain on the house is $50,000 above your exemption ($600,000 sale price minus $300,000 basis minus $250,000 exemption equals $50,000 taxable gain). Conclusion: George pays 3.8% new tax on that $50,000 gain of exactly $1,900.

2. Same scenario, but George and Gracie are married. Step 1: their income of $220,000 is below the

$250,000 married-person limit. They are not exposed taxpayers. They are not subject to the new tax (due to their income level) and are not subject to capital gain tax (due to their $500,000 capital gain exemption).

3. George and Gracie now have income of $260,000, their house was purchased for $300,000 and they are selling it for $900,000. Step 1: They are exposed taxpayers since their income of $260,000 is above the limit of $250,000 for married persons. Step 2: The taxable capital gain on the house is $100,000 ($900,000 sale price minus $300,000 basis minus $500,000 exemption equals $100,000 taxable gain). Conclusion: George and Gracie pay new tax of 3.8% on that $100,000 gain of exactly $3,800.

If someone is exposed to the new tax, that person is (or couple are) in the upper echelon of home sellers and wage earners. The vast majority of retired seniors neither earn enough income to be exposed to the new tax nor have homes valuable enough to be exposed to the new tax.

Medicare: Part A

Medicare Part A coverage, also called hospital insurance, covers most medically necessary hospital, skilled nursing facility, home health care, and hospice care. Part A enrollment is not mandatory, but it is automatic for anyone who receives Social Security benefits.

Hospital Coverage

Part A covers the cost of hospitalization after the enrollee pays a variety of out-of-pocket expenses. The enrollee gets 90 days of coverage per benefit period, and has a lifetime reserve of 60 days which can be used only once. If the enrollee is in the hospital longer than 90 days plus the reserve days, the enrollee pays the full cost each additional day.

Skilled Nursing Facility (SNF) Coverage

Medicare will pay for 20 days of skilled care or rehabilitation in a nursing home or in a skilled nursing facility located at a hospital – but only when the enrollee has been discharged from an acute care hospital. This benefit is granted on a limited basis.

Qualifying for Medicare's SNF coverage requires that the enrollee first spend three days in the hospital (not including the day of discharge.) It also requires that the enrollee be sent to the SNF on doctor's orders within 30 days of the day of leaving the hospital. This Part A benefit will cover the SNF's fees in full for the first 20 days so long as the patient makes progress in rehabilitation.

After the first 20 days, there is coverage for another 80 days. The patient must pay a large share of the costs per day during those 80 days. This co-payment only continues until the enrollee has been in the nursing home for 100 days, after which the enrollee must pay the entire bill (or find another program to assist, like Medicaid).

The days of coverage can be repeated if enough time lapses between illnesses. The enrollee must be outside a hospital or a SNF for at least 60 consecutive days. If the enrollee does remain in a nursing home during those 60 days, then they cannot receive any skilled care during those 60 days. If that time has passed, and if the enrollee has a new 3-day hospital stay, the SNF coverage starts again.

Home Health Care

Medicare covers the cost of part-time nursing care at home, or of physical, speech or occupational therapy at home when prescribed by a physician only when:

- The patient is considered a skilled care patient or needs therapy or rehabilitative services. Medicare will not pay for custodial assistance, drugs, full-time nursing care, home delivered meals, or housekeeping services. The physician determines whether the patient is in need of skilled care, subject to review by the Medicare intermediary; and,
- The patient must be homebound, or must be in an institution which is not a hospital or skilled nursing facility. Current rules define homebound to mean that it is a considerable and taxing effort to leave home. You need not be a prisoner in your home, but it must be a real effort to leave; and,
- The patient's doctor must prescribe and monitor the services, which must be provided by a qualified home health services agency.

An enrollee is entitled to part time home health care up to 8 hours per day but under most circumstances no

more than 28 hours per week. Care is provided in 60-day "episode of care" periods. If the enrollee uses one period, the doctor may authorize another.

Hospice Care

When the patient is diagnosed as terminal with 6 months (or less) to live, Medicare Part A will pay for the full cost of hospice care received in the home.

Medicare will initially cover two periods of 90 days (if the doctor certifies that the patient still needs the care). After that, the doctor must recertify the patient every 60 days – but there is no limit to the number of times the doctor can recertify the patient. Even if the patient lives beyond 6 months, Medicare will continue to cover hospice care so long as a doctor certified that it is probable that the terminal illness will cause death within the next 6 months.

When a patient opts for hospice care, he/she waives standard Medicare benefits for that period for any problem connected to the terminal illness. The patient can cancel hospice and return to standard Medicare benefits, but will lose any "unused" hospice days for that period.

Hospice pays for:

- Doctor services,
- Nursing care,
- Medical equipment (such as wheelchairs or walkers),
- Medical supplies (such as bandages and catheters),

- Drugs for symptom control and pain relief,
- Short-term care in the hospital, including respite care,
- Home health aide and homemaker services,
- Physical and occupational therapy,
- Speech therapy and Social worker services,
- Dietary counseling, and
- Counseling to help you and your family with grief and loss.

Despite those benefits, the patient will still have to pay $5 of the cost of each prescription for pain relief and symptom management and 5% of the cost of respite care. Under hospice, a family member is typically "on-duty" at all times. When that person needs a break, i.e., "respite," the patient can be temporarily cared for in a Medicaid approved hospital or nursing home. The stay cannot exceed 5 days.

Medicare: Part B

Medicare Part B is optional, however there are penalties for deferred enrollment and enrollees pay a monthly premium. The premium is automatically withdrawn from enrollee's Social Security checks and has grown from $58.70 monthly in 2003 to $104.90 in 2016, and will continue to be raised annually.

Deferred Enrollment

Though Medicare Part B is optional, Medicare assumes an enrollee wants the coverage and will automatically enroll anyone who qualifies for Part A. If an enrollee

wants to decline or to defer enrollment in Part B, the enrollee must inform Medicare.

A person who opted out of Part B coverage retains the legal right to opt in. However, when that person decides to opt in to Part B coverage, enrollment is only open between January 1st and March 31st of each year. Additionally, when that person enrolls, Medicare will impose an increase on its Part B premium by 10 percent for each year enrollment was delayed.

If a person, age 65 or older, has not yet retired and is provided health insurance by their employer then there is no penalty for late enrollment so long as enrollment is completed within eight months of retirement. If the retiree fails to enroll during that eight-month window, federal law requires the retiree to wait for the next general enrollment period (January 1st through March 31st of the following year) and imposes the 10 percent penalty.

Higher Income Enrollees Pay Higher Premiums

Under the "Medicare Prescription Drug, Improvement, and Modernization Act of 2003" (MPDIMA) the Part B premium began to increase every year, starting in 2007, for higher-income individuals. Current law, regarding specifically, individual taxpayers with "modified adjusted gross income (MAGI)":

- Between $85,000 - $107,000 pay 140% of the standard premium ($146.90);
- Between $107,000 - $160,000 pay 200% of the standard premium ($209.80);

- Between $160,000 - $214,000 pay 260% of the standard premium ($272.70); and,
- Above $214,000 pay 320% of the standard premium ($335.70).
- For married couples filing jointly, substitute $170,000, $214,000, $320,000 and $428,000 respectively.

The people who have paid the most in taxes through the years are the ones who will pay more for this program after retirement.

To complicate matters, the "modified adjusted gross income (MAGI)" figure is not taken directly from the 1040 tax return; rather, it is adjusted by deducting any income earned while residing in a variety of American Territories (like Puerto Rico) and by deducting income earned on education savings bonds. The income is then increased by adding in any tax-free interest earned or accrued (which should include IRA, 401k, and tax-free bonds). Further, one must always use MAGI from two years earlier (that is, in 2016, look at the 2014 income to do the calculations).

Here's an illustration: Jesse has MAGI of $110,000. The standard Part B premium in 2016 is $104.90. Jesse would pay $209.80/month that year (200% of the standard Part B monthly premium).

Medicare: Part D

The majority of Medicare-covered seniors are also enrolled for optional Part D prescription drug coverage. While enrollment in Part D is voluntary, the government

has pushed enrollment very hard. Here are Medicare's comments on when enrollment is allowed:

- If you have both Medicare and full Medicaid coverage, you can join a Part D plan at any time.
- If you are new to Medicare, you can join Part D during the period that starts three months before the month you get Medicare and ends three months after you get Medicare.
- If you are a member of a Medicare Advantage Plan, you could switch Medicare Advantage plans or leave your plan and get Original Medicare. However, while enrolled in a Medicare Advantage Plan you cannot add or drop drug coverage.
- In all other cases, if you want to change plans you are generally limited to making changes between November 15th and December 31st of each year.
- In special circumstances, Medicare may give you an opportunity to switch to another Medicare drug plan. A switch is allowed if you permanently move out of your drug plan's service area, if you qualify for extra help paying for prescription drugs, if the plan stops offering prescription drug coverage, or if you enter, live in, or leave a nursing home.

Part D Premiums and Benefits

To join Part D, enrollees may first pay a monthly premium to join a plan. Premiums range from $0 to $50 or more. The premium is paid whether you buy prescriptions or not. As a new cost, the premium can determine whether Part D saves you money or costs you

extra, so finding a suitable plan with the lowest possible premium is key for all participants.

Historically, when Part D began, enrollees paid 1) their monthly plan premium, 2) the first $310 of prescription costs out of pocket, 3) 25% of the cost of any additional prescriptions until the costs total $2,830, 4) 100% of the cost of prescriptions until drug costs reached $6,400 (the donut hole), and 5) after passing through the donut hole, 5% for any additional prescription costs. The Affordable Care Act significantly contracted the donut hole.

Changes to Part D under the ACA

Under the ACA, Seniors pay only a portion of the cost of drugs while they are in the donut hole. Before the ACA, Seniors paid 100% of the cost of drugs while in the donut hole. Enrollees pay about a share of the cost of their prescriptions while in the donut hole. With current ACA rules, by 2020, enrollee contributions will be capped at 25% of the cost of drugs while in the donut hole.

Formulary

When an enrollee selects a Part D plan, the first step is to see whether the plan actually covers that person's prescriptions. The list of covered drugs is called the plan's "formulary". Each plan gets to decide exactly what medicines they will cover or will exclude. The Medicare website, at WWW.MEDICARE.GOV, is a very effective way to compare formularies.

If the enrollee needs a drug that is not covered by a plan's formulary, the enrollee has to buy it on their own. The expenses for non-covered drugs do not count toward the deductible or the co-payments, which increases the enrollee's overall share of the cost for prescriptions.

Further, each enrollee will have to keep close track of their drug expenses. The provider of the Medicare drug plan can ask if the enrollee has, or is expect to have, any reimbursement from a third party (like another insurance plan). Failure to give a true answer will be legal grounds for termination of your Part D coverage.

Extra Assistance with Drug Costs

People whose income is below the Federal Poverty Level and who are qualified for SSI (Supplemental Security Income) were shifted onto Part D, away from Medicaid, as of January 1, 2006. SSI and others whose drugs were formerly covered by Medicaid pay no premium, pay no deductible, and do not face the donut hole. However, they do pay $2.65 out-of-pocket for each generic prescription and $6.60 for all other prescriptions until drug expenses reach $3,600, after which Part D pays all additional drug expenses. Individuals with annual income below $17,236 and resources below $13,301, or couples with income below $23,266 and resources below $26,581, can also qualify for assistance.

MEDIGAP POLICIES

Medicare Supplement Insurance Policies, commonly called Medigap policies, are tightly regulated by the states. The Affordable Care Act (Obamacare) had no impact on Medigap policies because they are not considered to be "major medical" policies – they are policies purchased to cover gaps which may exist in a retiree's Medicare coverage.

A person should only need ONE Medigap policy, if any. If a person qualifies for Medicaid and the QMB program in addition to Medicare, then a Medigap policy should not be necessary at all. If an employer offers group health coverage, then the employee's needs may also be met. If a person enrolls in a Medicare Choice+ HMO, then a Medigap policy is not necessary.

When a person turns 65 and enrolls in Part A and Part B of Medicare, they are entitled to purchase a Medigap policy regardless of their health condition. This window stays open for 6 months.

If the person buys a policy, it can exclude coverage for pre-existing conditions. But, the insurance company cannot refuse to sell the person a policy during that time period, even if their health is bad.

Standardized Medigap Plans

Federal law mandates standardization of Medigap policies, with the varieties labeled type A through L. All policies must offer a "core package" of benefits that cover:

- All co-payments for hospitalization under Part A;
- 365 days of additional hospitalization after Medicare benefits run-out;
- The Part B 20% co-payment; and,
- The cost of the first three pints of blood per year.

These core benefits still leave significant gaps in coverage. The patient still pays for deductibles, for prescriptions (or at least the gaps left by Medicare Part D), for preventive care, and for nursing home care. Companies may offer policies that offer more than the core benefits, but will charge more for them.

Medigap Sales Reform

For years, one rip-off that seniors were exposed to was the Medigap policy oversell. It was not unusual for a trusting yet frightened senior to buy two, three or even four duplicative Medigap policies. Congress passed a law forbidding double coverage. An insurance Agent offering Medigap policies must provide a written warning that:

- The enrollee probably only needs one Medigap policy;
- People on Medicaid generally do not need Medigap insurance; and,
- Counseling services are available if the enrollee is confused about their options.

The salesperson is not allowed to sell a policy if they fail to get the listing of the enrollee's current policies. The salesperson is legally forbidden to sell another

policy to an enrollee if they have another Medigap policy, or if they are on Medicaid. However, if the enrollee signs a statement that the new policy replaces one they are canceling, or that it does not duplicate coverage, they can still sell you the policy. Do not sign a release without first understanding your rights.

By law, enrollees get a 30-day "free-look" at any Medigap policy. Even after agreeing to purchase the policy and pay the first premium, the company must allow the enrollee to cancel and give a refund during the first 30-day period. If the policy is being returned, send it to the insurance company by certified mail to have a record of the date.

Long-Term Care Insurance

Neither Medicare benefits nor Medigap policies provide significant long-term coverage. Long Term Care (LTC) insurance may help avoid financial collapse caused by the high cost of long-term care. LTC insurance can be over-priced and under-paying.

An LTC policy is yet another type of insurance. It must be acquired it separately from other insurance, and it will cost extra. Like any medical insurance, the LTC policy should be purchased while the insured is still healthy and is able to pay premiums to the insurance company.

Be careful of what policy terms are purchased, and with selecting the insurance company.

Issues When Shopping for a Policy

Consider the following when shopping for a long term care insurance policy:

- Is your budget so tight that the cost of insurance would impact your ability to pay for daily expenses now? Do you have enough monthly income to pay for your care without buying insurance? Nursing home costs can range anywhere from $3,500 to $6,500 or more per month. If you have enough income to pay that bill, why buy insurance? (Remember to factor in the living expenses of your spouse. If he or she will be at home while you are in the nursing home, you will need enough money to pay for both locations. If you have income of $3,000 per month and your spouse will need $1,500 per month to stay at home. If the nursing home will cost $3,500 per month, you will need an extra $2,000 every month to make ends meet. This extra money could come out of your savings and/or investments. Or you could buy an LTC policy for $2,000 plus inflation. The sales Agent may try to sell you $3,500 coverage to pay for the nursing home. Look at your budget and buy only what you need and can afford.)
- Does the policy adjust for inflation, or will the policy pay for less-and-less as inflation makes care more expensive? Buying an inflation rider costs extra, but may make the policy more realistic.
- How does the policy define long-term care? Does the policy cover all levels: skilled, intermediate, custodial and home care? If it covers only skilled care, you might never be ill enough to draw on the

benefits. On the other hand, adding home care may cost extra. The Texas Insurance Commission requires that any LTC policy issued in Texas must provide benefits for more than one level of care[56]. Generally, newer LTC policies offer coverage for both nursing home and in-home care. Texas regulations require the policy to pay for lower level care (like in-home care) without first requiring you to be in a nursing home.

- How long is the elimination period? Most policies contain a waiting period before they will pay. If the first month of care has to come out of your pocket, then the insurance company saves money. If you can afford to pay for the first three months out-of-pocket then the insurance company saves even more money. If you can cover a longer up-front expense, your policy premiums will be less expensive.
- Does the policy pay for pre-existing conditions? Most policies will not pay the bills for any illness you had before you bought the policy; some have a waiting period of up to two years before they begin to pay. The shortest wait is the best. Remember to be completely honest about pre-existing conditions when you apply for your policy. If the insurance company finds out that you lied on the application, they can deny the coverage you thought you had secured.

[56] 28 TAC, Part 1, Chapter 3, Subchapter Y

- Older policies often required you to be in the hospital for a certain number of days before admission to the nursing home. Texas regulations now forbid this practice. Legally, your LTC policy cannot require that you be in the hospital before admission to a nursing home. Any LTC policy issued in Texas after September 1, 1992 must pay benefits without regard to pre-hospitalization if you suffer:

    - A functional impairment in performing the activities of daily living (ADLs) like eating, transferring, bathing, walking, toileting and dressing; or,
    - An impairment of cognitive ability (loss of intellectual capacity requiring continual supervision as supported by clinical diagnosis). Insurance regulations require that LTC policies pay for nursing home care due to Alzheimer's disease.

If an LTC policy was issued before September 1, 1992, then those more liberal terms may not be in the policy. Consider updating the policy (which may require canceling the existing coverage and buying a whole new policy). Recognize the insured may not qualify for a new policy, and a new policy will probably be significantly more expensive since the insured is now older.

Look for a policy where the legal contract provisions include:

- Guaranteed renewability (they cannot cancel so long as premiums are paid);

- Waiver of payment of the premium after the insured enters a nursing home; and,
- A flat premium that does not increase as the insured gets older.

LTC Partnership Policies

Texas has a program called the “Long-Term Care Partnership”. The stated goal is to give Texans “the information and tools you need to plan for long-term care[57]”. The Partnership is the government’s way of encouraging you to purchase a long term care insurance policy, and to coordinate the efforts of the insurance companies, insurance Agents, and State agencies like the Texas Department of Insurance, the Texas Health and Human Services Commission, and the Texas Department of Aging and Disability Services.

If the LTC policy you purchase is one approved as a Partnership-qualified policy, you are granted dollar-for-dollar resource protection if you also apply for Medicaid. The State allows you set retain one dollar of your own money for every dollar which the qualified policy pays toward your LTC expenses.

All of the Partnership-qualified policies also include inflation protection, are tax qualified so the premium is

[57] http://www.ownyourfuturetexas.org/faq/

partly deductible, and provide reciprocity with other States if they also have a Partnership-style plan.

Premium Deduction

The "Health Insurance Portability and Accountability Act" (HIPAA) passed by Congress in 1996 included a major tax change. The premiums paid for any LTC policy are partially deductible on the 1040 income tax return.

There are two limits:

- Premiums are deductible just like health insurance premiums. Then they are deductible only after medical expenses reach 10% of your adjusted gross income (or, if you are 65+, 7.5% of your AGI through year 2016). Take care to itemize.
- The amount deductible depends on the insured's age. The younger the insured is, the less they are allowed to deduct.

Table 2: Premium Deduction in 2016	
Age 40 or less	$390
Ages 41 to 50	$730
Ages 51 to 60	$1,460
Ages 61 to 70	$3,900
Ages 71 and older	$4,870

Federal law currently allows deductions for all Long Term Care policies issued after 1996 and only for the few which had the approval of State Board of Insurance prior to 1996.

LTC Benefits Are Tax Free

There is no income tax on benefits paid under a LTC policy, up to $340 per day (in 2016). The IRS cumulates benefits paid to or for your long term care by insurance companies under an LTC policy and under accelerated death benefits from life insurance. If the total received, less what was paid for care, does not exceed $340/day, then there is no income tax on the benefit (IRS form 8853).

TAX BENEFITS OF CARING FOR ELDERLY PARENTS

Dependent Deduction

Caring for an elderly parent, while not legally required, is still a widespread and loving practice. In recognition of the costs and expenses of caring for an elderly parent, the IRS may allow a caregiver-child to claim their parent as a dependent and take a tax deduction. The Internal Revenue Code lists four conditions that must be met. The parent must:

- Receive over half their support from the caregiver-child. The "fair market value" of the lodging provided to them counts as part of the support. Keep close track of expenditures to be sure this condition is met;
- Be U.S. Citizen, a resident alien, (or if a U.S. taxpayer lives in Canada or in Mexico, the parent can live with the taxpayer in Canada or in Mexico;
- Not file a joint income tax return for the tax year you want to claim the dependency deduction; and,
- Have gross income during the tax year less than the exemption amount. This does not include tax-free social security income.

A parent may qualify as a dependent even if they do not live with their child. If the parent fulfills all of the other criteria, then the child may legally deduct the exemption amount on their tax return. The amount changes from year-to-year. If the parent does not meet any one of the tests, then the dependency deduction is disallowed.

If they pass all the tests or if they pass them all except for the income test, the child can still deduct any medical expenses paid on the parent's behalf. This deduction for medical expenses can be, at times, more valuable than the dependency deduction.

Medical expenses can only be deducted if insurance did not reimburse the expense. Also, the total medical expenses claimed on the tax return will have to exceed 7.5%[58] of the child's adjusted gross income (AGI) to be deductible.

When trying to reach the threshold, add together medical costs paid for both the taxpayer and for the parents. Include the cost of transportation essential to medical care, premiums for health insurance, hospitalization insurance, and membership fees for group health plans and HMOs. Keep close track of all payments for physician, hospital, nursing home, and dental care.

---

[58] Note that deductions for medical expenses not covered by health insurance must exceed 10% of the taxpayer's AGI to be deducted. There is one exception: if you or your spouse is 65+, then you may continue to use the 7.5% threshold for the medical deduction through tax year 2016. In tax year 2017, all taxpayers are hit with the 10% of AGI threshold for deductibility of medical expenses.

ASSISTED LIVING FACILITIES

Types of Facilities

Assisted living facilities are for people who do not need the range of services provided by a Nursing Home. Assisted living may be less expensive than a nursing home. Licensure is overseen by state agencies. For instance, in Texas, assisted living facilities are licensed by the Department of Aging and Disability Services.

An assisted living facility is any residential setting for four or more persons that also provides specific services. Texas State regulations categorize facilities as either:

- Type A: facilities that accept residents capable of evacuating the premises unassisted, of following directions under emergency conditions, and of handling their own routine care during the night.
- Type B: facilities that accept residents inappropriate for Type A placement because of immobility, but who are not permanently bedfast.
- Type C: facilities with four beds that meet minimum standards set for adult foster care.
- Type E: facilities very similar to Type A, but can include those in wheelchairs or electric carts who can transfer and evacuate themselves in an emergency. They provide more general care services (supervision of medications and welfare, but no substantial assistance with meals, dressing, movement, bathing or other needs).

If you reorder that list by the *amount of care and supervision* provided, you get Type B, Type A, Type E, then Type C. In other words, Type B facilities offer the most care and supervision and Type C offer the least.

Beware Unlicensed Facilities

Be aware that another category exists: unlicensed care facilities. If a facility houses less than four residents, then in Texas a license is NOT legally required and it is not regulated by the state. If a facility is operated by a tax-exempt *religious* organization that has operated for at least 35 years, then regardless of the number of residents it is NOT legally required to have a license to run an assisted living facility, and Texas does not oversee its operation. This may save money for the organization, but may put its residents at risk. It may also be unconstitutional favoritism showed to religion over secular institutions that are performing exactly the same function.

With a licensed facility, the state can suspend or revoke the facility's license if conditions threaten the health or safety of the residents. It can be shut down by the State to protect the consumer. But if your family member is in an unlicensed facility, the state is far less likely to intervene. Also, the owner(s) of an unlicensed facility may try to impose unreasonable terms for the care they provide (no refund for unused days, extra fees for services that should be included, limited visitation hours). Also be aware that claiming a religious motivation to care for the elderly does not guarantee

honesty or quality services, and may be more of a sales pitch than a reality.

MEDICAID FOR LONG-TERM CARE

Medicaid is not available to everyone. As a government welfare program, paid for by the taxpayers, much of its funding is spent on providing medical care to dependent children, disabled persons, and the poor.

Qualifying for Medicaid is like shooting at a moving target, and in order to qualify a citizen must have monthly income and assets below a specified cap. The fundamental laws and policies that govern Medicaid are created through the political process in Washington. Congress loves to change the rules every few years, and the changes have a large impact on the entire system. The more routine rules that implement and manage the minutia of Medicaid come from each state's capital.

Texas adjusts to changes handed down by the federal government, and frequently adjusts or rewrites its own Medicaid policies. A computer system in Midland, Texas now reviews all Medicaid applications – and does a poor job of understanding all of the complex legal and regulatory details. Complaints and delays abound.

As a consequence, predicting Medicaid is hard and planning your way into qualifying for its benefits is complex. Always seek advice from a Certified Elder Law Attorney before taking an action to qualify for

Medicaid to be sure that you are dealing with the most current law and regulations.

One of Medicaid's basic standards, the financial limits set by Medicaid, change by design at least every year. As they are released annually, updated Texas Medicaid figures will be posted at WWW.TEXASESTATEANDPROBATE.COM

Medicaid Benefits

Once a person is approved for Medicaid, the program will provide several benefits. Although Medicaid covers a wide variety of medical needs for low income and low asset elder or disabled individuals, seniors don't access Medicaid's "hospital and doctor" coverage because they have Medicare to pay those costs.

Instead, many elders rely on Medicaid to pay all or part of the daily cost of long-term nursing home care.

Nursing Home Daily Care

Currently, in most cases, Medicaid does not simply pay 100% of the nursing home bill. The patient is still required to contribute. How much the patient contributes depends on several factors: (1) whether the patient's spouse is still alive, and (2) whether there are other medical expenses that must be covered.

First example:

> Robert is the nursing home patient, and his wife Dolores lives at home. He has monthly income of $1,900 and she has monthly income of $1,275.

> Following the MMMNA rules, Dolores keeps $2,980.50 each month. The excess is spent in two ways. First, $60 is set aside for Robert's personal needs. Second, they pay the nursing home the remaining $134.50. This fully consumes the joint monthly income. The nursing home charge, however, is $5,000 per month. Consequently, Medicaid pays the balance of the nursing home's bill: $4.866.50.

Second example:

> Robert is widowed, has $1,200 per month income, and lives in the nursing home. It costs $5,000 per month. First, $60 is set aside for Robert's personal needs. The rest of his income, $1,140, is paid to the nursing home. Medicaid pays the balance: $3,860.

Medical Needs & Prescriptions in the Nursing Home

The nursing facility must provide for the total medical, nursing, and psychosocial needs of each resident. This must include room and board, social services, meals (whether the patient requires a regular, special or supplemental diet), non-prescription drugs, medical accessories and equipment, medical supplies, personal needs items, and rehabilitative therapies.

Before Medicare Part D took effect, Texas Medicaid paid for the resident's prescriptions. Since then, all prescriptions are handled under Part D.

Community Based Alternatives (Star+Plus Waiver)

Medicaid recognizes that a nursing home is not always the best or the least expensive care option. It created the "Community Based Alternatives" program (CBA) to provide home and community-based services to meet the need for patient care outside a nursing home setting. Recently, the State has replaced CBA with "Star+Plus Waiver" (SPW) in the larger population centers around Texas.

CBA/SPW provide for a wide variety of needs. These include adaptive aids and medical supplies, adult foster care, case management by DHS staff, minor modifications to the home, physical therapy, residential nursing care services, respite care, and speech pathology. They also include basic housekeeping and laundry.

CBA/SPW is available to anyone who would otherwise qualify for the nursing home program, with a few differences. Perhaps the biggest difference is the way that the Spousal Protected Resource Allowance is handled. Under the full nursing home program, the SPRA is calculated only once, upon the first qualification for benefits. Under the SPW program, the SPRA is calculated upon first qualification as well… but if the beneficiary becomes ineligible for a short time, for any reason, on reapplication the SPRA is recalculated based on the couple's resources at that later date. The effect is that the couples protected resources

are cut in half each and every time the patient re-qualifies for SPW.

CBA/SPW are Medicaid "waiver" programs, which means that they were created as exceptions to the broader requirements imposed by Washington. The U.S. Supreme Court, in its Olmstead decision[59], mandated that States must provide the least restrictive living environment for persons needing long-term care services. Texas has provided a limited budget for CBA/SPW and can only handle a limited number of patients at a time. When it deems that the program is fully enrolled, it places new applicants on a waiting list until a space opens. In late 2015, the waiting list for home and community based care exceeds 72,000 individuals.

There is one shortcut to bypass the CBA/SPW waiting list to get in the program faster. This shortcut is not required by law, and may become unavailable in the future. However, a patient who is in the process of being discharged from a nursing home back to the homestead goes to the head of the line should they need to reapply.

---

[59]Olmstead v. L.C., 527 U.S. 581, 138 F.3d 893 (1999) (affirmed in part, vacated in part, and remanded).

QMB: Help with Medicare Costs

QMB is a Medicaid program that helps seniors pay for their health care in much the same way that a Medigap policy might. QMB stands for "Qualified Medicare Beneficiary". Under QMB, certain aged and disabled people are entitled to have Medic<u>aid</u> pay their Medi<u>care</u> premiums, deductibles and coinsurance. It is an effort to shift some cost burden from Medicaid onto Medicare. This has nothing to do with paying for a nursing home stay. It is an entirely separate program designed to benefit low income Senior Texans.

To qualify, a Senior must meet three standards:

First, they must have income below the "Federal Poverty Level"[60]. The state will subtract a $20 per month buffer when calculating the applicant's net income.

Second, the countable resources must be limited. Some things, like the homestead, an automobile, burial plots, and personal possessions usually do not count as resources.

Third, the Senior must be enrolled in Medicare Part A. Most seniors receive Part A because of their (or their spouse's) employment record. However, some seniors

---

[60] Current Federal Poverty Level figures are available at http://aspe.hhs.gov/poverty/figures-fed-reg.shtml

age 65 and up only get Part A if they elect to participate in Part B and to purchase Part A. Some people under 65 can get Part A if they are on kidney dialysis or if they are on disability benefits from either Social Security or the Railroad Retirement Board for more than 24 months.

Generally, seniors enroll in Medicare either 1) during the seven-month period surrounding their 65th birthday, or 2) during the annual enrollment period from January 1st through March 31st of each year. If a Senior delays beyond the time surrounding the 65th birthday, then a premium is charged for Part A coverage.

If a senior has low income and their Medicare premiums are unaffordable, QMB may offer coverage. If a person qualifies for QMB, Texas will pay:

- Medicare premiums for Parts A, B and D;
- Part A, B and D deductibles;
- The daily coinsurance charges for extended hospital and skilled nursing facility stays; and,
- The 20% Part B coinsurance, depending on which doctor you use.

To qualify for QMB, a person MUST already be signed up for Part A, or must apply for Part A before the end of the day on March 31st each year. Contact Social Security at 1-800-SSA-1213 or visit the local Social Security office.

Qualifying for Medicaid

To qualify for Medicaid funds for nursing home care, the patient must clear five hurdles - Age, Residency, Level of Care, Monthly Income Amount, and Asset Amount.

Aged, Blind, or Disabled

The nursing home resident must be 65 or older, or must be blind, or disabled. This is perhaps the simplest of the five hurdles that must each be jumped prior to qualifying for Medicaid assistance.

Residency and Citizenship

An applicant for Medicaid benefits must be a resident of the state in which the application is submitted. The law and regulations do not give a technical definition of "residence," so relying on common experience, it means that the person must live in the state of application, and not reside in another state.

If a person temporarily visits another state, with intent to return to their home state, the temporary change does not alter their residency. The absence time away must have a specific purpose, and when that purpose is fulfilled, the person must move back to their home state.

The patient must also be a legal resident of the United States: a citizen, a permanent resident alien, or a person permanently living in the U.S. "under color of law".

The "color of law" exception is broad. If a person can prove that he/she has resided in the U.S. continually

since January 1, 1972, then he/she is a resident under "color of law". Further, any alien living in the U.S. indefinitely with the knowledge and permission of the Immigration and Naturalization Service is a resident under "color of law". Finally, any person who entered the U.S. before January 1, 1972 and who may be eligible for permanent residence at the discretion of the Attorney General is a resident under "color of law".

Proof of Citizenship

Legal aliens have the burden to prove their status. As of July 1, 2006 the burden to prove status was also imposed on full U.S. Citizens. Congress, in the Deficit Reduction Act of 2005 (DRA 2005) imposed a requirement that all Medicaid applicants prove their citizenship and identity before they can be approved for benefits.

Proof of citizenship and identity has been classified into four categories by the Center for Medicaid Services. They are:

- A U.S. Passport, Naturalization certificate or Certificate of Citizenship;
- A U.S. birth certificate or other birth certificate that establishes citizenship (including an adoption decree), a U.S. Citizen ID card, an American Indian ID card or evidence of civil service employment before 1976;
- An extract that is at least 5 years old of a U.S. hospital birth, or a life or health insurance record that

is at least 5 years old showing a US place of birth; and,

- A U.S. Census record showing citizenship or a U.S. birthplace, admission papers to a nursing home that are at least 5 years old showing a U.S. birthplace, various other birth notations that are at least 5 years old, or an affidavit of citizenship (but an affidavit is allowed only in rare circumstances).

Even current Medicaid beneficiaries will be required to prove U.S. Citizenship and their identity during their recertification review. Those who can produce the documentation will be recertified. Those who cannot produce documents but who continuously "show a good faith effort" to produce them will be allowed to retain their benefits.

Regulations defining "continuously" have not been issued, but it seems that an ill nursing home resident would not be able to meet the literal meaning of the word by searching for the documentation without any type of pause or break, and thus would easily fail to meet Medicaid's new proof requirement. Until federal regulations require otherwise, the Texas Health and Human Services Commission plans to accept Affidavits of Citizenship in a liberal fashion to help people maintain their eligibility[61].

[61] www.hhs.state.tx.us/medicaid/engApp.shtml

Level of Care

Medicaid will not pay for custodial care. Hence, by default the patient must be classified at either the "intermediate" or "skilled" care level. The determination is made near the time of application for benefits by the Director of Nurses, an "assessor" who is a Nurse, or by the Physician. Overcoming this hurdle is usually not difficult.

Monthly Income Amount

Medicaid imposes a limit on monthly income for individuals and a different monthly income limit when both husband and wife will both be in a nursing facility under Medicaid at the same time.

The income limit is raised annually. When social security benefits go up the income limit also increases. The income limit is based on the Federal Benefit Rate (FBR), which is the limit that Social Security uses to decide if someone is eligible for Supplemental Security Income (SSI). The FBR is multiplied times three to get the Texas Medicaid income limit.

Income is countable only if the applicant's name is on the check. The Social Security check made out to the applicant is their income. The Social Security check made out to the other spouse is not the applicant's income.

For years, the income cap was very harsh. If your income was even one dollar over the limit, Medicaid

would not pay a penny for your care. Then the idea of a "Qualified Income Trust" was invented.

Table 3: Financial Limits on Medicaid[62]			
	2014 Amounts	**2015** Amounts	**2016** Amounts
Income Cap (single)	$2,163	$2,199	$2,199
Income Cap (couple)	$4,326	$4,398	$4,398
Minimum Protected Resource Amount	$23,448	$23,844	$23,844
Maximum Protected Resource Amount	$117,240	$119,200	$119,200
Protected Income allowance	$2,931	$2,980.50	$2,980.50
Gift Penalty	$156.34/day	$162.41/day	$162.41/day

[62] Visit HTTPS://TEXASESTATEANDPROBATE.COM/?S=INCOME+LIMITS&SUBMIT=SEARCH for updated financial limit information for years beyond 2016.

The Qualified Income Trust (Miller Trust)

A Qualified Income Trust it is a legal way to get around the income cap otherwise imposed by Medicaid. It will not shelter assets. It is not a way to "hide money" nor is it a way to save resources.

This arrangement grew out of a federal court case brought by a family in Colorado with the last name of Miller[63]. A nursing home resident (Miller) had too much income to qualify for Medicaid. His family went to court to create a Guardianship, and obtained a court order imposing a limit on the amount of retirement funds the resident could use each month. The Court created a Trust, placed all of the retirement funds in that trust, and ordered the trustee to limit withdrawals to an amount that was less than the Medicaid income cap.

Colorado contested the trust, but eventually a federal court decided the Trust idea was legal. Mr. Miller was allowed to receive Medicaid benefits even though, without the Trust, his income would have been too high.

As a result of this case, Congress passed an amendment to the Social Security Act (it contains the Medicaid laws) to formalize the idea that the Miller case started.

---

[63]Miller v. Ibarra, 746 F. Supp. 19 (D.Colo. 1990)

Medicaid officially refers to this arrangement as a Qualified Income Trust (QIT) but you may hear it called a “Miller Trust” or even a “96p Trust” (because it is based on section 1396p of the federal law[64]).

The federal law says that a QIT may contain only pension funds, social security funds, and other income due to the nursing home resident. It cannot own any other asset, even a car or a savings bond. Here is an example of how a QIT works:

> Charles has regular monthly income of $2300 (a Social Security check of $1000 and his retirement pension check of $1300) and the income cap is $2199. His spouse Stan has income of $750 from Social Security. They have some resources that are below the necessary limits.
>
> Charles needs nursing home care. At this point, Medicaid looks only at the checks written to Charles totaling $2300, which exceeds the income cap of $2199. He cannot qualify unless he uses a QIT. The trust is written by Charles’ attorney and given to Medicaid along with the application for benefits. A bank account is established for the trust, and Stan is listed as trustee.
>
> Each month, Stan deposits Charles’ $1300 pension check to the trust’s bank account. Medicaid is allowed to ignore that amount when calculating Charles’

[64] 42 USC 1396p(d)(4)(b) and 40 TAC 15.417(f)(3)

income – and since he is left with $1000, which is below the cap of $2199 – he qualifies for Medicaid assistance.

What happens to the money in the Trust? It must be spent each month according to Medicaid's rules. Depending on the amounts involved, some of it might be paid to Margaret. Federal law sets out four priorities for spending the money in a Qualified Income Trust. They are:

- Paying the "personal needs allowance" for the resident. In Texas, this has been set at $60/month for many years;
- Paying the spousal allowance;
- Paying for the resident's nursing home and other medical care; and,
- Paying other expenses, like bank fees, taxes or legal costs. In real life, all the money in a Qualified Income Trust is consumed for the first three priorities.

Obtaining a Qualified Income Trust

The Medicaid caseworker is an employee of the state, and is not licensed or authorized to prepare any legal documents. To obtain a Qualified Income Trust, you will need an attorney who has experience in drafting trusts relating to public benefits.

Total Asset Amount

Medicaid categorizes your assets as either "countable" or "exempt", and the exemptions are very narrow and

highly specific. If countable assets exceed $2,000 value for a single person or $3,000 for a married couple (both of who are applying for benefits) Medicaid will not pay for nursing home care.

Spousal Resources Are Not Exempt

Under the Medicaid statutes and regulations, all assets owned by either spouse are generally considered "available" to pay for medical care of either spouse. The policy set by Congress assumes that married people will take care of each other before asking the taxpayers to do so. Thus, all assets are categorized as either "countable" or "exempt" whether they are community property or separate property.

Premarital Agreements

What if a couple is in their second marriage and, thinking ahead about long-term care, they signed a Premarital Agreement? They both agreed that the assets each owned prior to marriage remain separate property and that the other will bear no liability to pay for the spouse's health care (there is no "duty of support" to each other). Can they rely on the premarital agreement to shelter assets from paying for one spouse's medical needs?

Not really. A Premarital Agreement operates under state law. As such, it makes the Agreement is clear that *the ill spouse* cannot demand that the well spouse pay their medical bills. The ill spouse has no right to receive support from the other's separate property. Conversely,

Medicaid is a federal program (it is just administered by the state). As such, its rules ignore state laws.

Federal Medicaid law and regulations require that all of the countable resources that belong to either spouse be reported to Medicaid, regardless of the existence of a Premarital Agreement. If those combined resources leave more than $2,000 plus the spousal allowance as countable for the ill spouse, then no assistance will be provided.

When the “duty of support” has been eliminated in a Premarital Agreement, spouses are not required by law to pay for each other’s nursing home bill. But under these circumstances, Medicaid is also not required by law to pay. Federal law says that a spouse must use his or her resources before taxpayer dollars are used. So the well spouse is put to the test by Congress: does the spouse refuse to pay with their separate money - meaning that the ill spouse does not get needed care - or does the well spouse capitulate, and pay regardless of the Agreement?

Note also that if there is no Premarital Agreement (or if the existing Premarital Agreement does not eliminate the “duty of support”) then spouses are liable to pay for each other’s “necessaries”. That includes medical care, and the liability does extend to the separate property belonging to the well spouse.

Finally, examine the divorce option. When a marriage ends, the separate property of one ex-spouse will no longer be counted against the other ex-spouse who is seeking Medicaid. This approach is risky, since some

Judges actually refuse to grant a divorce if it is based on the need for a federal benefit (they say that state law does not allow divorce for that cause).

Standard Asset Exemptions

Certain assets are automatically treated as exempt. Owning them will not disqualify the applicant from receiving Medicaid. Exempt assets include:

- Burial allowance of $1,500 cash, in an earmarked burial fund, or in a revocable burial contract. On the other hand, an irrevocable prepaid burial plan may have any value, without limit;
- A burial plot, casket and vault, regardless of their value;
- Term life insurance of any amount and other life insurance with a death benefit of $1,500 or less per insured. If the death benefit of a policy is more than $1,500 then that policy's cash surrender value is counted as a resource;
- One automobile of any value, and a second auto is allowed if the household has more than one person, and the auto is being used for work-related transportation when the first vehicle is not available for work-related transportation or is handicapped-equipped and used for a household member;
- Home furnishings and other personal belongings;
- Livestock that is maintained as part of a trade or business or solely for home consumption is exempt; otherwise, the livestock's current market value is a countable resource;

- The homestead. Historically, any homestead of any value was exempt. Congress decided to place a limit on homestead values, so now (2016) a homestead will be exempt only up to $552,000 for a single individual. For a married couple, there is no limit on the value of the homestead.

Medicaid does not care if an asset is owned just by the husband or just by the wife. It does not make a distinction for community property versus separate property. Moreover, it does not care whether you have a Premarital Agreement.

Homestead Exemption

The most significant exemption is a person's homestead: for an unmarried person, the value of the home (up to $552,000 in 2016) is exempt. If the well-spouse, minor child, or disabled adult child continues to reside there then there is no value cap.

To obtain any exemption for the home, the applicant must express intent to return to it. The focus is on intentions, not on abilities. It does not matter that the applicant may be too incapacitated actually to return to the home, so long as the applicant would *intend* to return if they could.

In this context, "homestead" means the primary place of residence before moving to the nursing home. Before going to the nursing home, the applicant (or the well spouse or a dependent) must have lived in that home. No other type of real estate is exempt.

The Medicaid definition of homestead is broader than the definition of homestead in Texas property law. For Medicaid purposes there is no limit on the number of acres that are exempt.

Rental of the Homestead

When a person applies for Medicaid, their home is exempt only so long as the applicant intends to return to it. If there is no well spouse or a dependent who resides in the home the house does not have to sit unoccupied. It can be rented out temporarily – so long as the process is handled carefully.

Rent only for short terms. Do not rent it out for a long period (like a one- or two-year lease) because Medicaid might assert that the applicant cannot return to the home. If the applicant cannot return, it loses homestead status and becomes just another countable asset. And as a countable asset, it might disqualify the applicant from receiving Medicaid assistance.

A short-term lease is therefore safest for Medicaid purposes. The best arrangement is a month-to-month lease, so that the tenant can be moved-out promptly.

When rent is received, the money is income. Hopefully that income will not shove the applicant over the $2,199 income limit, or the applicant will be disqualified from receiving Medicaid assistance (or will have to obtain a Qualified Income Trust).

In almost all situations, Texas will count any rental income against the applicant. One exception: if there is

a corresponding expense that offsets the rental income, then the rental income may not be counted. For instance, if the tenant pays exactly the amount needed to maintain the property then there may not be any additional income.

Home Mortgage

If the home has a mortgage, any principal paid by the tenant directly to the mortgage company on behalf of the Medicaid beneficiary does count as income. It also is not available as an offsetting expense. This means that an equal amount would have to be paid to the nursing home by someone on behalf of the beneficiary.

The regulations do offer an unusual alternative: have the tenant pay only the interest portion of the monthly mortgage. Interest is an expense, and not treated as income. A family member who does not reside in the house should pay the principal. Why would a family member do so? Perhaps they expect to inherit the house someday. Making the payment protects and preserves the property

House-sitters

A vacant house is exposed to many risks. It might be vandalized. It is a drain on family funds for property taxes and for maintenance. And the homeowner's insurance company may resist covering the home against fire and theft if it is vacant for a long period. These risks should motivate the homeowner to let someone occupy the home while away from it for Medicaid purposes.

Many families allow a younger relative to "house-sit". Perhaps a grandchild in college could live in the home rent-free. If so, the risks of vacancy are reduced and the home is still exempt for Medicaid purposes.

If there is no relative who can occupy the home, leasing it out is a valid alternative. Remember, however, that for the home to be exempt it must be available for the homeowner to return to it. A long-term lease makes it unavailable causing it to lose its exempt status. Thus, a short-term or month-to-month lease is preferable.

Other Asset Exemptions

The law allows some other exemptions, but they are more difficult to handle. They are:

- Certain annuities, under extremely tight rules;
- An allowance for a married couple so the at-home spouse has some funds to pay for living expenses. The spouse who is living at home (called the "community spouse") is allowed to retain funds so that he or she will not become impoverished;
- Business assets that produce income need for self-support. For example, a rental property will not be counted as a disqualifying asset if the income it produces is needed. For a single person, the income will all be paid to the nursing facility (thus reducing Medicaid's share of the expenses), but for a married person, the income can be used to raise the at-home spouse's income up to the $2,980.50 needs allowance. The key to claiming this exemption is to have a federal tax return (1040) that includes a

"Schedule C" – which shows that you operated the rent house as a business. Without the proper tax return, Medicaid will not exempt the property's value;
- Non-business assets that produce income needed for survival, but only when the equity value does not exceed $6,000 and the asset historically get at least a 6% net annual rate of return;

Assets that are exempted by regulation but which are unusual, including: payments for relocation assistance and crime victim compensation, payments from radiation exposure compensation, death benefits used to pay for someone else's funeral and last illness, earned income tax credits, reparations paid by Germany to holocaust survivors, certain payments to native Americans, payments made to settle a lawsuit against Bayer Corporation, and a few other special items.

Medicaid Planning Strategies

Medicaid planning involves legally manipulating the applicant's income and resources so the government will pay part or all of the cost of your long-term health care. Public policy has allowed manipulation within limits for several decades, but the limits have been consistently tightened. Currently, and for years, the law has imposed a civil sanction for giving away assets: the applicant will be disqualified from receiving Medicaid assistance for a period of time depending on the amount given away.

Transfer Penalties

A person's assets belong to that person, and they have the legal right to dispose of them in any way desired. If the choice is to give away assets, Medicaid has a programmed and predicable response. First, they require that an applicant disclose transfers made within a certain time frame. Second, they calculate the resulting disqualification period. They cannot stop a person from making gifts, they can just react to the fact that gifts were given.

The "Look-Back" Period

Medicaid can only ask about any transfer made within the 60 months prior to filing the Medicaid application. Consequently, an applicant could give away an asset and then wait five years before applying for benefits. Medicaid cannot then ask about the transfer. Theoretically a person could give away all their assets, of any value, and then wait 60 months and the transfer will not disqualify them from receiving Medicaid. But, there are huge risks to making bulk transfers of all assets.

First, Congress can change the rules in mid-game. Currently the look-back period is 60 months. Before 2005 the look-back period was 36 months. Years earlier, it was 30 months. There is nothing to stop Congress from expanding the time again, giving Medicaid power to ask about a broader time period than it could when the gift was given. The applicant would then be required to report the gift, and a disqualification period could be imposed. Just because the gift has been given does not

give the applicant any special status as grandfathered into the old law; if Congress sets new laws, everyone is subject to the new laws.

Second, there is no guarantee that the assets will remain safe in someone else's hands. When the transfer is made, those assets become the property of the recipient. If assets are given to one or all of the children, the parent has given up all legal control of and access to the assets. There are risks even if the children are meticulously honest. For instance, if the son causes an auto accident and is sued, the assets in his name may be taken to cover the liability. Or if the daughter becomes ill and runs up medical bills, the assets may be consumed for her care.

Third, the IRS may want to collect a gift tax depending on the size of the transfer.

Disqualification Period

When a transfer is made, Medicaid will deny benefits for a time equivalent to the number of days those funds could have paid for the applicant's care. This disqualification period is calculated by dividing the amount transferred by the cost of a day in a nursing home. Since all nursing homes are slightly different, the state uses an average amount… so it may not reflect reality. Here is an example:

> Carol gives away $10,000 to her daughter and applies for Medicaid. On the application they ask if she has made any gifts in the last 60 months and she discloses this recent transfer (lying is fraudulent). The state's determination of the average cost of care in Texas is

$162.41 per day. Take 10,000 and divide by 162.40, and you get 61 (that is, 10000÷162.41=61.57, rounded down). Because Carol gave away that money, Medicaid imposes a disqualification period of 61 days.

If Carol had given away $65,000, she is disqualified for 400 days. If she gives away $200,000, she is disqualified for 1231 days.

The Deficit Reduction Act of 2005 (DRA 2005) changed the way the disqualification period is applied. *Before DRA 2005,* the disqualification days started to count off beginning with the day the gift was given. If $10,000 was given away on January 1, 2004, the 85-day disqualification period expired 85 days later, on March 26, 2004. (In 2004, the disqualification period was calculated using a cost of $117.08 per day so the penalty was 85 days instead of the 61 days it would be under 2016 calculations).

Currently, (after DRA 2005), the disqualification days start to count off beginning when the person would otherwise qualify for Medicaid. If $10,000 was given away on June 1, 2016, the 61-day disqualification period is stored on the shelf. If the donor remained healthy until June 1, 2017 and then applied for Medicaid, the days were then taken off the shelf and were imposed as a disqualification. The disqualification is stored up until public benefits become an actual necessity, and then the disqualification days are used to deny benefits.

Transfer Exceptions

Generally, transferring title to an exempt resource (like the homestead) incurs a transfer penalty.

However, a transfer between spouses does not trigger the penalty. Medicaid does not care if title to the house is in the name of both spouses, in the name of the applicant, or in the name of the community spouse. Often, it is sensible to ask your Certified Elder Law Attorney to write a proper document which would put the house into the name of the community spouse, as part of your estate plan. Why? If the applicant dies first, there will be no need to probate a Will to pass title to the survivor. Again, the details are important and your Certified Elder Law Attorney will know the right ones for you in case the community spouse dies first. Their Will should recite that the assets are left to the children or to a Special Needs Trust for the patient, but not directly to the nursing home patient. This transfers the assets away from the patient – but there is no transfer penalty since it occurred because of a death. The assets are thus protected (had they been left directly to the applicant Medicaid would have withdrawn benefits until the assets were consumed below $2,000).

Likewise, a transfer of the home to an adult child who is either blind or disabled does not trigger the penalty, nor does transfer of the house to a specially created Trust for that disabled person (so long as the disabled person is under age 65). It is also legal to transfer the home to a sibling of the Medicaid patient, when that sibling has an ownership interest in the home and has

lived there for at least one year before the patient moved to a nursing facility.

Transfer of the home to an adult child causes no transfer penalty if 1) that child has lived in the house for at least two years before the parent moved into the nursing home, and 2) that child provided support services to the parent that allowed the parent to avoid moving to the nursing home for some time. Proof of those services must take the form of a letter from a doctor attesting to the services provided.

One more transfer exception: if money is given to a 529 plan for the educational benefit of the grandchildren (and if that plan is in a custodial arrangement so the donor has no control over it) then there is no penalty for making the transfer.

Transfer Resources to a Trust

A "Medicaid Qualifying Trust" does not qualify an applicant for Medicaid anymore. The rules now count all assets in a Medicaid Qualifying Trust as though they still belong to the applicant. Any Trust you can revoke, whether you retain other benefits or not, counts against the applicant.

Some Irrevocable Trusts are useful in a very restrictive fashion. Any Irrevocable Trust counts against the applicant if there are any circumstances under which they could receive benefits from the Trust—whether or not those benefits are actually received. However, if an Irrevocable Trust follows certain rules it can act as an asset shelter. These rules are so restrictive and

unattractive that most people seeking Medicaid planning squarely reject them. The rules are:

- The Grantor of the Trust cannot be a Trustee. An independent third party, over whom the Grantor has no legal control, must be Trustee.
- The Trust must be irrevocable. The Grantor cannot change his or her mind once the trust owns the resources.
- The Grantor is entitled to minor benefits only. No access to the principal is allowed, and access to income is restricted.
- The 60-month look-back applies. There is a transfer penalty for putting assets into Trust unless the Grantors wait up to five years before applying for Medicaid. Congress may expand the look-back period without warning.

Personal Service Contracts

When an adult child lives with elder parents and provides care which keeps them from having to go to a nursing home, and a "personal services contract" is signed to pay that adult child fair value for those services rendered, is that a disqualifying transfer under Medicaid? Yes, and no, depending on the circumstances.

Compensation *is not allowed* for services that would be normally provided by a family member (such as house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, and transportation to medical care).

Compensation *is allowed* for services that are health care oriented so long as there is evidence that those services were actually performed. Further, the agreement must be established on or before the date any funds are transferred, not as an afterthought. The transfer of funds must be intended to provide real and needed services instead of just being a way to hide money. Additionally, *the family member must have lost other income.*

Here is an example of a personal services contract Texas would accept.

> Mom and daughter agree in December that if daughter will quit her job to care for mom during her illness, mom will pay daughter $10,000. In January daughter quits her job, where she was being paid $1,000 per month. In July, mom goes to a nursing home. Texas will allow six months of services at $1,000/month as legitimate, so $6,000 is not a disqualifying transfer. The balance of $4,000 was not earned but was transferred, so it disqualifies mom from getting Medicaid's help for 24 days.

Shifting Resources

Shifting resources from being countable into one of the exempt categories is another planning strategy. The applicant can qualify for Medicaid even though they own a home, auto, burial plan, etc. Medicaid's rules allow an applicant to enhance the value of those exempt categories at the expense of non-exempt funds. For example:

> Max has $50,000 in savings and has a house. He cannot qualify for Medicaid because the $50,000 is a countable resource. He cannot transfer the $50,000 to his daughter Auri because it would create a disqualification period of 307 days. Instead, Max shifts a much as he can into exempt categories. With the $50,000, he is legally allowed to pay off the $15,000 balance on his mortgage, to purchase a non-refundable funeral plan for $8,000, to pay off his credit card debt of $3,000, and to repair the roof on his house for $6,000. Now he has $18,000 instead of $50,000 – but the funds were spent to eliminate debt, to prepay expenses Auri would have been stuck with, and to enhance the value of her inheritance (the home). The $18,000 remainder will cover 3 or 4 months in the nursing home. Under the current rules, once his assets are below $2,000 he will qualify for Medicaid.

There are other shifting opportunities available, like purchasing a new automobile or purchasing a new more expensive homestead. Those ideas may be extreme and have consequences that make them less attractive (i.e., how is the applicant going to pay property taxes on that new, expensive home?). These strategies should always be discussed with a qualified Attorney before being implemented.

Non-Attorney Counselors

Several businesses offer to do Medicaid planning for a fee. Be very cautious as they are not licensed attorneys. Consequently:

- The information provided to them is neither confidential nor privileged. They do not have an

obligation to protect the financial data provided to them.

- They may share financial data with insurance brokers, who may try to sell annuities or other insurance products. They may try to sell an annuity directly, claiming that the annuity will allow the applicant to qualify for Medicaid.

Texas law[65] says that a person who is not licensed to practice law cannot charge a fee for representing an applicant at a Medicaid hearing or for aiding in applying for Medicaid benefits. The offense is a Class A misdemeanor. This law allows anyone to assist with a Medicaid application – but only a lawyer can legally collect a fee for doing so. Why? Lawyers must follow strict rules of conduct, must place your interests before theirs, must meet continuing education standards, must pass examinations that allow them to provide legal services, etc.… Non-lawyers can simply say, "Hey, I can help you with that," without any imposed standards, and without the rules of conduct imposed on licensed attorneys

Sometimes these companies try to avoid the law by associating with a law office. That strategy does not make their efforts legal unless the lawyer directly

---

[65] Texas Human Resources Code §12.001

oversees their activities while they handle your Medicaid issues.

Spousal Protection Rules

When one spouse lives in a nursing home and the other lives at home, the community spouse may fear losing everything before public benefits step in to help. The current spousal impoverishment provisions (which should really be called the "non-impoverishment" provisions) help protect any married couple, one of whom was in a nursing home on or after September 30, 1989 for any period longer than 29 days.

Spousal Protected Resource Amount (SPRA)

When one spouse enters a nursing home with the intent of remaining for 30 days or more, the couple can request an assessment of their resources by Medicaid.

The couple reports their assets, with information based on the asset values as of midnight of the first day of the month in which the ill spouse entered the nursing home. From that total, the value of all exempt assets is deducted. An allowance is then calculated by cutting the countable resources into two equal shares; however, the set aside for the community spouse cannot be less than $23,884 or more than $119,200 (2016 figures).

The most advantageous way to use the SPRA is to report as high a countable asset base as possible. Why? Because you want the protected amount to be as large as possible when they cut the countable resources into two equal shares. Rule of thumb: only pay off

mortgages and bills (shifting) *after* the SPRA assessment is completed. For example:

> Scenario 1: Carl and Elizabeth had countable assets of $208,800 and their house has a $50,000 mortgage. Elizabeth wants to pay off the mortgage. If she pays off the mortgage first, before the SPRA assessment, she hurts herself financially because paying the mortgage reduces the countable resources of $208,800 to $158,800. Her SPRA half would then be $79,400. If, however, Elizabeth asks Medicaid to assess the resources *first* and pays off the mortgage *after the assessment*, she reports countable assets of $208,800. Her protected half upon assessment is then $104,400 instead of $79,400. Elizabeth then pays off the mortgage of $50,000 *from Carl's share*. She ends up with a clear title to the home, a protected amount $104,400, and Carl has only $54,400 which must be spent before he qualifies for Medicaid.

Income Allowance

The spousal impoverishment provisions also include an income allowance. The community spouse is allowed to keep up to $2,980.50 per month (2016 figure) to maintain the household. This is called the Minimum Monthly Maintenance Needs Allowance or the MMMNA.

> Assume Carl has monthly income of $1,950 and Elizabeth has monthly income of $1,150 from Social Security. Each month, Elizabeth would keep $2,980.50 from this combined income, and would pay the balance ($119.50) to the nursing home for Carl's care (including Carl's $60/month personal needs allowance).

This income allowance often interacts closely with the establishment of a Qualified Income Trust. If, in the above example, Carl had income of $2,300 per month and Elizabeth's income is $300 per month. Carl would only qualify for Medicaid if he has a Qualified Income Trust to bring his $2,300 below the $2,199 limit. But, Elizabeth is still entitled to her $2,980.50 per month allowance, so part of her allowance could be paid from funds that had been diverted to the Qualified Income Trust. They do not have enough income to supply her with the full $2,980.50 allowance, but she does get to retain all of their joint monthly cash flow and may be entitled to an Expanded Protected Resource Amount.

Expanded Protected Resource Amount

The income allowance has another major role to play. What if the income from both spouses is not enough to cover the $2,980.50 income allowance? For instance, if Carl's income is $800 and Elizabeth's income is $300, she is entitled to keep the entire $1,100 for her MMMNA. But, $1,100 is far less than the allowance of $2,980.50 To fill that gap, Medicaid will allow Elizabeth's protected resource allowance to be increased beyond the typical one-half of countable resources. The theory by the law makers is that the extra funds can be invested to produce the income necessary to fill the shortfall in her income.

How much could a married couple expand the protected resource allowance? It depends on two factors: 1) the size of the gap, and 2) current interest rates for a one-year certificate of deposit in your community. Here is a

step-by-step guide to the calculation, based on Carl and Elizabeth’s situation:

Table 4: Expanded Personal Resource Allowance		
Step 1:	Enter the minimum monthly maintenance needs allowance	$ 2,980.50
Step 2:	Enter combined income of both spouses, less $60	$ 1,040.00
Step 3:	Subtract Step 2 from Step 1	$ 1,940.50
Step 4:	If step 3 is $0 or a negative number STOP. Otherwise, proceed to step 5	
Step 5:	Multiply the amount in step 3 by 1200	$ 23,286.00
Step 6:	Enter the interest rate for a one-year CD here	0.5
Step 7:	Divide the amount in Step 6 by the interest rate	$ 4,657,200

Amazing yet correct. In this example, current law says the community spouse (Elizabeth) would be allowed an investment pool of more than $4.6 million. Using the facts from Scenario 1 where the countable resources are $50,000 and the standard protected resource allowance

is $25,000, the expanded resource allowance lets Elizabeth keep all $50,000 and Carl can go on Medicaid immediately without shifting or spending his share. The contributing factors, again, are the amount of retirement income (step 2) and the interest rate (step 7). Interest rates can be obtained from your local bank – many of them post rates on the Internet. Just choose the lowest rate that they publish for a one-year CD.

Once the expanded PRA has been established, the excess funds can be invested in any way that the community spouse elects. Just because they used a low one-year CD rate to calculate the amount does not mean that the funds actually have to be invested in CDs at that rate. If the money is tied up in stocks, current law says it can legally stay in stocks.

Medicaid Estate Recovery Program

By federal mandate, the states are required to attempt to recoup the funds they spend on Medicaid by making claims against recipient's estates.

Medicaid Estate Recovery Program (MERP) took effect in Texas on March 1, 2005. The program only applies to people who applied for benefits after March 1, 2005. It is not retroactive.

MERP is restricted to Medicaid recipients who are 55 or older. MERP applies to Medicaid's nursing home benefit, Star+Plus, and benefit for the mentally retarded.

MERP regulations provide each state a clear and well established procedure for making a claim to recover public funds which were spent to care for a Medicaid beneficiary.

Each state has slightly different rules. For instance, in Texas when a Medicaid beneficiary dies, a notice is sent to either:

- The estate representative (Executor or administrator);
- The beneficiary's court appointed Guardian;
- The beneficiary's Agent under a Durable Power of Attorney;
- The beneficiary's Agent under a Medical Power of Attorney; or,
- If none of the above are known, family members who have acted on behalf of the beneficiary.

The state asks for a reply to its notice so that they will know whether any exception should be considered before they file their official claim. If no exceptions apply, the State decides whether to present a claim in probate court under Chapter 355 of the Texas Estates Code.

MERP will *not* bring a claim if any of these exceptions apply:

- There is a surviving spouse;
- There is a surviving child under age 21;
- There is a surviving child of any age who is blind or disabled under the Social Security standards;

- There is an unmarried adult child who resided continuously in the decedent's homestead for at least one year prior to the time of the beneficiary’s death;
- The assets are fit into narrow categories that belong to American Indians or Alaska Natives, or represent reparation payments from a government;
- There is an undue hardship; or,
- Bringing the claim will not be cost-effective.

Avoiding Estate Recovery

The only significant asset that most Medicaid beneficiaries own when they die is their homestead. Thus, avoiding MERP is the equivalent of protecting the homestead so it can pass to the next generation, even though the taxpayer paid for the medical expenses of the deceased. The law provides several opportunities to protect the homestead, the most obvious were already discussed.

What strategies can be used when the standard exemptions do not apply? The house cannot simply be given away, since that would be a disqualifying transfer. Title can only pass at the moment of the beneficiary’s death to avoid being a disqualifying transfer. But, the traditional method of passing title upon death is to probate the decedent’s Last Will and Testament, which is exactly where MERP wants you to be so they can bring their claim. Thus, to avoid a MERP claim the estate must stay out of probate court.

There are several possible currently legal strategies to avoid probate of a home title. Each has its pros and cons.

Each strategy can either help or harm a family so do not choose one without the specific legal guidance of a qualified Attorney. They are:

Lady Bird Deed Strategy

The name "Lady Bird" appears to have arisen by whim; it has no official connection to the former First Lady. This is also called an "Enhanced Life Estate Deed" or a "Life Estate Deed with Power of Appointment". The idea is that the homeowner signs a deed with wording that retains for the homeowner a life estate (the right to occupy and use the home). Upon the homeowner's death, title transfers to the persons named in the deed. However, the deed also says that the homeowner can cancel the transaction at any time or can name different people to receive title. That eliminates any value in the deed until the moment that it can no longer be cancelled (the moment of death). Currently, without any value being transferred there is no disqualification that arises from the deed's existence like there is for a standard life estate transfer. See additional information in ABOUT LADY BIRD DEEDS.

Right of Survivorship Deed Strategy

In this arrangement, the homeowner sells a tiny fractional interest in the home to someone (usually the adult children who the parent wishes to inherit the house). That fraction has so little value that it does not currently have an impact on the Medicaid qualification process. The deed contains language establishing a Right of Survivorship among those joint owners. When the Medicaid beneficiary dies title passes to the other

owners without probate. So long as the other owners agree that they will not interfere if the Medicaid beneficiary desires to sell the home (which never really occurs) then Medicaid considers the house "available" to the beneficiary and thus its status as an exempt homestead remains intact.

Living Trust Strategy

Living Trusts can be very beneficial for some families, and the opposite for others. For Medicaid, a Living Trust does *not* act as a place to hide assets in order to qualify for benefits. If the home is held in trust, its value will act as a roadblock to qualifying for benefits. If the home is taken out of the Living Trust, it will once again be treated as a non-countable resource that does not interfere with qualifying for benefits.

Thus, even though a Living Trust avoids probate, it also may destroy the ability to qualify for Medicaid. Consequently, anyone who does receive Medicaid benefits should consult a CELA before creating a Living Trust.

Transfer on Death of First Spouse

Deed of Partition Strategy:

MERP cannot make a claim against the house if the Medicaid beneficiary does not own it. Aside from the options discussed above, there are only a few other ways to transfer title without creating a disqualification.

A current one is to have the husband and wife sign a Deed of Partition, converting the home into the separate property of the community spouse. That spouse then makes a Will or other arrangement to pass title to other family members upon death. If the community spouse dies first, the nursing home spouse continues to qualify for benefits but does not own a home. If the nursing home spouse dies first, there is no need to probate the estate for transfer of ownership of the house, and there is no MERP claim against the house.

Ownership Transfer Strategies:

Another such current opportunity is to transfer ownership to an adult child who is disabled or to a sibling who resides in and owns part of the house. Another is to transfer ownership to an unmarried adult child who lived in the home and provided care to the parent for at least two years before the parent moved into the nursing home (and who has a letter from the doctor or a social worker testifying to the care that was provided).

Texas MERP provides an automatic exemption from a claim if there is a surviving spouse, a disabled child, or an unmarried child living in the house. If MERP is already avoided, why bother to do a transfer of title? Because the person who creates the exemption could predecease the nursing home resident. If the plan is to avoid MERP because a child is disabled, what happens if complications from that disability cause the child's death while the parent is still alive in the nursing home? The exemption is lost. But if title is transferred to that

child while she is alive, it is a done deal. If she dies before you, you still have no interest in the house that Medicaid can claim using MERP.

✶ Caution! Rules Can Change ✶

No matter what the plan, something or someone can change and that change will affect the plan. The plan must be kept current.

Medicaid rules also change. At any time, federal or state legislators or regulators may decide that a planning techniques is too forgiving and disallow it. Be sure to consult with a qualified Attorney before taking action on any of the techniques discussed here.

Medicaid Annuities

In broad terms, annuities are an insurance product that can be used for long-term investment purposes or to create a monthly cash flow for the purchaser. Even without Medicaid considerations, annuities have drawbacks the sales rep may not have emphasized. For instance:

- Deferred annuities have a penalty provision for early withdrawal of funds (though minimal withdrawals may be penalty free). It is common to lose up to ten percent of your invested principal if you need to take all the funds out before the annuity matures.
- Annuities have sales commissions that may be higher than other investments. The commissions are what motivated the lecturer to invite you to a free

lunch and are what pay for your lunch if you decide to invest.

From the narrower perspective of qualifying for Medicaid, annuities create many problems. Currently, tight restrictions apply to annuities, forcing them to be treated like any other investment. Restrictions include:

- All deferred annuities are counted as resources;
- Immediate annuities are counted as resources unless the annuity is 1) irrevocable, 2) distributed in equal monthly installments, 3) distributed entirely within the applicant's life expectancy, and 4) repays the State for its Medicaid expenditures except for payments made to the applicant's spouse; and,
- When an immediate annuity meets those requirements (and is not a countable resource) the payments made from it on a monthly basis are countable income. If the Medicaid applicant's income exceeds $2,199 per month, the patient may be disqualified from Medicaid. If the annuity payments are made to the applicant's spouse, the payments when cumulated with all the other income the couple has, cannot be retained when the income exceeds $2,980.50 per month.

Payments under an annuity must be made in equal amounts each month over the projected lifetime of the patient (which may be only a handful of years). This increases the size of the payment, making it more likely that the income limits will be surpassed. Thus, an immediate annuity with all the required restrictions is

only practical if the applicant has a fairly low monthly income from other sources.

Veterans Benefits

VA Long-Term Care

The Department of Veterans Affairs provides some long-term care. The biggest problem is the long waiting list. Several VA Hospitals have "Extended Care and Therapy Centers". These are like nursing facilities, but their goal is to rehabilitate patients and return them to the community. Not all patients will be accepted for care. Contact your local VA office for details.

Veterans with a service-connected disability are given top priority for nursing home care. All other Veterans are taken on a space-available basis.

No income assessment is done by the VA for any "Eligible Veteran", which is defined as a (1) Veteran with service-connected disability, (2) Veteran who was exposed to herbicides (i.e., Agent Orange) while serving in Vietnam, (3) Veteran exposed to radiation during atmospheric testing or in the occupation of Hiroshima and Nagasaki, (4) Veteran with a condition related to an "environmental exposure" in the Persian Gulf war, (5) Former prisoner of war, (6) Veteran on VA pension, (7) Veteran of the Mexican Border period or

World War I, and (8) Veteran otherwise eligible for Medicaid[66].

Veterans needing nursing home care can be moved at VA expense to a private nursing home when discharged from a VA medical center or nursing home. Generally, VA care does not exceed six months, except when a Veteran needs nursing home care due to a service-connected disability.

Texas Veterans Nursing Homes

In coordination with the VA, the Texas Veterans Land Board operates a series of subsidized nursing facilities. To qualify for care in a State Veterans Home, the veteran must be an "eligible veteran" as defined above, and must:

- Have both a physician and the VA concur in the need for long-term nursing care;
- Be 18 or older;
- Be a Texas resident now and when he/she began military service, or have resided in Texas continuously for a full year before seeking admission to the facility; and,
- Not have a dishonorable discharge from the service.

[66] 38 CFR, Part 51.50

Additionally, a spouse or surviving spouse of a veteran or a "gold star parent" (someone whose daughter or son died while in the military) qualifies for care in a State Veterans Home.

Facilities are available in Amarillo, Temple, Big Spring, Floresville, Bonham, McAllen, Tyler and El Paso. Since the government pays part of the cost of care, a resident's out of pocket costs are reduced.

VA Aid & Attendance

A Veteran or widow(er) of Veteran who is already qualified for a regular VA pension may qualify for Aid & Attendance (A&A) benefits upon meeting these standards:

1. The following three "service" oriented requirements must all be met:

- The veteran served 90 consecutive days on active duty, at least one of those days was during a war time period; AND,
- The veteran received a discharge other than dishonorable; AND,
- The veteran is Age 65+ OR has a permanent disability rated at 100%.

2. The veteran must have limited annual *net* income (gross income is netted downward to account for ongoing medical expenses, health insurance premiums and deductibles, the cost of prescriptions, and the cost of home health care or assisted living or nursing home care). So you can have a fairly high gross income, so

long as your medical expenses bring the net income below the limit.

3. The veteran must lack “sufficient means” to pay ongoing expenses. Informally, that is interpreted to mean assets totaling $80,000 or less. However, unlike Medicaid, A&A has no restriction on transfer of assets to others to artificially reach the lower asset levels. (But note: new Regulations to control “abuses” of the A&A system are pending, including a Medicaid-like transfer penalty.)

4. At least one of the following requirements must be met to establish medical need:

- The veteran must need the aid of another person in order to perform personal functions required in everyday living, such as bathing, feeding, dressing, attending to the wants of nature, adjusting prosthetic devices, or protecting themselves from the hazards of their daily environment, **OR**,
- The veteran must be bedridden, in that their disability or disabilities requires that he/she remain in bed apart from any prescribed course of convalescence or treatment, **OR**,
- The veteran must be a patient in a nursing home due to mental or physical incapacity, **OR**,
- The veteran must be blind, or so nearly blind as to have corrected visual acuity of 5/200 or less in both eyes, or must have concentric contraction of the visual field to 5 degrees or less.

To contact the VA regarding Pension and Aid & Assistance questions, call **1-800-827-1000.**

PART 12: Texas Laws Protecting Seniors

BILL OF RIGHTS FOR THE ELDERLY

A person does not lose their civil rights upon entering a nursing home or being admitted to a hospital. The only process that can remove the person's civil rights is Guardianship, after respecting the legal due process rights of the individual.

The Texas Bill of Rights for the Elderly[67] defines "elderly" as a person 60 or older. A care provider may not deny an elderly individual a right guaranteed by the law. Each State agency that licenses, registers, or certifies service providers must require the providers to implement and enforce these rights. Violation of any right by a service provider is grounds for suspension or revocation of a provider's license, registration, or certification.

[67] Texas Human Resources Code, Chapter 102

Notice

A service provider is required to provide each elderly individual with a written list of his or her rights before providing services (or as soon after providing services as possible) and must post the list in a conspicuous location. A service provider must inform an elderly individual of changes or revisions in the list.

Many of the Rights granted to the "elderly" overlap with the rights granted to "patients" in general. Hence, it is important to realize that these rights apply to the elderly whether they are ill or healthy, whether they are patients or not.

Civil Rights

An elderly individual has all the rights, benefits, responsibilities, and privileges granted by the Constitution and laws of Texas and the United States, except where lawfully restricted. The elderly individual has the right to be free of interference, coercion, discrimination, and reprisal in exercising these civil rights.

An elderly individual has the right to be treated with dignity and respect for the personal integrity of the individual, without regard to race, religion, national origin, sex, age, disability, marital status, or source of payment.

Privacy

An elderly individual is entitled to privacy while attending to personal needs and to a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatments, written communications, telephone conversations, meeting with family, and access to resident councils.

An elderly person may send and receive unopened mail, and the service provider shall ensure that his or her mail is sent and delivered promptly. If an elderly individual is married and the spouse is receiving similar services, the couple may share a room.

An elderly individual may participate in activities of social, religious or community groups unless the participation interferes with the rights of other persons.

Financial Management

An elderly individual may manage their own personal financial affairs and may authorize in writing another person to manage their money.

The elderly individual may choose the manner in which their money is managed, including a money management program, a representative payee program, a financial durable power of attorney, a trust, or a similar method. Additionally, he or she may choose the least restrictive of those methods.

Under the Bill of Rights, when the elderly Principal (or their representative) so requests, the money manager shall make available the related financial records and provide an accounting of the money.

An elderly individual's designation of another person to manage their money does not affect their ability to exercise another right described in the law.

An elderly individual may retain and use personal possessions, including clothing and furnishings, as space permits. The number of personal possessions may be limited for the health and safety of other individuals.

Medical Decisions

Under Texas law, an elderly individual has the right:

- To be fully informed, in language that he or she can understand, of their total medical condition and to be notified whenever there is a significant change in their medical condition;
- To choose and retain a personal physician and to be fully informed in advance about treatment or care that may affect their well-being;
- To participate in an individual plan of care that describes their medical, nursing, and psychological needs and how the needs will be met;
- To refuse medical treatment after being advised of the possible consequences of refusing treatment and after understanding the consequences of refusing treatment; and,
- To be free from physical and mental abuse, including corporal punishment or physical or chemical

restraints that are administered for the purpose of discipline or convenience and are not required to treat their medical symptoms.

Electronic surveillance

Electronic surveillance – that is, video or audio recording – is a very delicate balancing act. What if you suspect there is some malfeasance occurring in your mother's nursing home room? You want to be sure she is safe and secure, but at the same time she is an adult woman with her own legal rights. The Texas "Bill of Rights for the Elderly" guarantees her legal right to privacy, the right to handle her own finances, the right to make her own medical decisions, and the right to be free of electronic monitoring.

Texas law assumes that seniors are legally competent. Even if a person suffers from dementia so severe as to be classified as incapacitated, that person still has all rights under the Bill of Rights for the Elderly. While incapacitated, that person's rights are generally delegated to the Agent under the Durable Power of Attorney.

The only right that cannot be delegated to the Agent named in the Durable Power of Attorney is the right to authorize electronic surveillance. The Texas Health and Safety Code explicitly provides that only the patient, a court appointed Guardian, or the "legal representative" as defined in the Texas Administrative Code can authorize electronic surveillance. The law explicitly does not allow the Agent under a Durable Power of Attorney to authorize electronic monitoring.

If the patient is considered incapacitated and does not have a court appointed Guardian, then the "legal representative" includes (in this order of priority): a) the Agent appointed in the Medical Power of Attorney, b) the spouse, c) a majority of the adult children, or one of them who has consent from all the others, d) the parents, e) someone else the patient clearly identified for this task before becoming incapacitated, or f) the nearest living relative.

Any type of electronic surveillance, be it video or audio, computerized, wireless or a simple tape recording, is legally forbidden without properly authorized legal consent.

Although the law seems to be written to protect the resident's privacy, it has another major impact. If surveillance is legally authorized and installed, and abuse or neglect of the resident is detected, the person who approved its installation can be held criminally liable for failing to report any abuse or neglect of the resident. Failure to watch a recording is not a defense; it is assumed that the responsible party watched the surveillance record within 14 days of its creation.

This places a huge burden on anyone who thinks that recording the resident's room is a good way to catch a boyfriend, thief, or a nurse mishandling the patient. If that recording runs 24-hours a day, the record will have to be viewed in its entirety to look for instances of abuse or neglect. If abuse happens and the recording was not viewed (so the abuse was not reported), the patient's responsible party can be criminally prosecuted.

"Transfer and discharge" means moving the resident to another facility. If movement is to an uncertified part of the same facility (that is, a part that does not accept Medicare or Medicaid) it is still a transfer and discharge. Movement to another bed in the same certified facility is not a transfer.

Transfer and discharge is not allowed UNLESS:

- It is necessary for the resident's welfare, and the resident's needs cannot be met at the current facility;
- It is appropriate because of improved health of the resident, who no longer needs the care provided by the facility; or the resident requests a transfer or a discharge;
- The resident's safety is endangered in the facility, or someone else's safety is endangered due to the resident's condition or actions;
- The resident fails to pay for their stay. However, adequate notice is required; or,
- The facility stops providing the type of services needed by the resident.

30-day prior notice is required prior to discharge or to transfer unless the resident or their representative requests the move. Shorter notice is allowed if the health or safety of any individual is at risk or if the resident has not yet been in the facility for 30 days.

A discharge notice can be appealed within 10 days of receipt. If the resident is on Medicaid, payment

continues until the hearing officer makes a final determination.

A move to another room can only happen if 5-day advance notice is given, if the resident requests the move, or if there is an emergency.

Adult Protective Services

If a person witnesses or has cause to believe that a Senior is being abused, exploited, or neglected, that person has a legal obligation to report the events to Adult Protective Services (APS), part of the Texas Department of Family and Protective Services (DFPS). All reports are confidential and state law provides immunity from potential civil or criminal liability arising out of the report.

Elderly or Disabled Adults

Protective services are available to anyone 65 or older or to anyone over 18 with a mental, physical, or developmental disability. The definition of "disability" is liberal, so if you are not sure whether a person qualifies it is best to call anyway. APS' mission is to protect these persons from abuse, neglect, and exploitation.

Abuse, Neglect, and Exploitation

A large portion of the reports to APS involve "neglect". Neglect occurs when an elderly person is without the

goods or services necessary to prevent physical harm, mental anguish or mental illness even though there is a responsible caretaker.

Many other cases involve reports of "abuse" involving intentional injury, unreasonable confinement, intimidation, or cruel punishment of an elder.

The rest deal with "exploitation": illegal or improper acts of a caretaker who uses the elderly person's resources for the caretaker's own personal benefit.

Reports to Adult Protective Services

Any report made to APS is legally confidential. The caseworkers will not even disclose the information in court unless ordered to do so by the Judge. Telephone reports may be made anonymously, but online reports identify the informant by their Email address. Even so, online reports are still confidential.

A report can be filed regarding abuse of a Senior online at WWW.TXABUSEHOTLINE.ORG or by phone to the APS Hotline at 1-800-252-5400.

Failure to make a report is a "Class A" misdemeanor[68] punishable by:

- A fine not to exceed $4,000;

---

[68] Texas Human Resources Code, §48.052

- Confinement in jail for a term not to exceed one year; or,
- Both the fine and confinement.

To commit the crime of “Failure to report”, a person must have cause to believe that an elderly or disabled person has been or is being abused, exploited, or neglected. That person must then knowingly fail to report the information to APS.

When a report is made to APS, the informant is immune from civil liability for releasing the information about the abuse. The informant is protected by law even if they release information obtained at work – like a bank teller reporting suspicions that a customer is being exploited.

Response to a Report

Upon receiving a report, APS is required to investigate within 24 hours. If it determines the elderly person really needs protection, APS then determines what services are needed, how the services will be paid for, and if the elderly person wants the services.

State law gives APS the tools it needs to act. With prior court authorization, it can enter a home (along with a police officer) to conduct its investigation. It can seek an emergency order for protection of an elderly person if that person needs protection but lacks mental capacity to accept or to reject the services. It can also seek injunctions against any person who attempts to interfere with the providing of its services to an elderly person who has consented to the services.

Homestead Tax Reductions

Texas law grants an exemption to lower the amount of property taxes paid by homeowners who reach age 65. It is a "65-plus" exemption, not an "over-65" exemption as many people believe. The homeowner qualifies for the exemption in the year that he/she turns 65 – as though on January 1st of that year their 65th birthday had already arrived. For example:

> Sarah turns 65 in October 2015 and her husband Peter turns 65 in June 2016. Sarah is treated as though she was 65 on January 1, 2015, so she gets the exemption in 2015. Note that only one spouse need reach age 65 for the tax exemption to begin.

65-plus homeowners qualify for an exemption on the homestead's value against school taxes. 65-plus homeowners who qualify for the exemption also have a school tax ceiling for their home. The school taxes are frozen at their age-65 level and do not increase unless the home is significantly improved (like adding a game room, but not normal repairs or maintenance). The tax ceiling changes if the house is sold and a replacement is purchased, using a formula keyed to the original tax freeze.

The school tax ceiling transfers to the surviving spouse if they are 55 or older and has ownership in the home. The survivor must, however, apply to the local appraisal district for the tax ceiling to transfer.

The 65-plus exemptions are not automatic. The survivor must apply for them, which can usually be started with a phone call to the local Appraisal District. They will ask for the survivor's birth date and the property tax account number, so have last year's tax receipt handy. Once they verify the information against their records, they will send a form to complete and return.

Death of the 65-Plus Homeowner

What if a homeowner is already receiving the 65-plus exemption, the spouse is younger than 65, and the older spouse dies? Texas law allows the exemption to rollover to the younger spouse so long as they are 55 or older. The younger spouse must also become owner of the house after the death and must reside in the home. This is another good reason to have a valid and up-to-date Will. The school tax freeze also rolls over to the younger spouse's benefit.

Home in Living Trust

If a home is transferred into a Living Trust, the 65-plus homestead tax exemption is lost *unless* the Trust complies with section 11.13(j) of the Texas Tax Code. To comply, the Living Trust must have several features. They are:

- The Trust must allow the Grantor to use the homestead without paying any rent, and must require the Grantor to pay the property taxes when they become due;

- The Grantor must be allowed to use the homestead for their entire lifetime, for a specified number of years, or until the Trust is revoked; and,
- The Trust must become owner of the homestead in a properly recorded deed. The deed must contain the homestead's legal description and must be signed by the Grantor of the Trust.

If your Living Trust does not contain those provisions, see your attorney because they can and should be added with an amendment.

Tax Deferral

"Defer" means to delay payment. The taxes are still owed by the homeowner; payment is just delayed until the property is sold, or the owner moves out or dies (and consequently the homestead is no longer a homestead). Texas allows residents 65-plus (or disabled) to defer payment of property taxes on their homestead, if they own their home outright. A homestead owned by a 65-plus person must be free of debt – have no mortgage or equity loan. If so, the law allows the homeowner to defer taxes imposed by the school district, the county, and the city. It does not allow deferral of any federal tax collected by the IRS.

To obtain a deferral, the owner must sign form 33.06 in front of a notary and file it with the local Appraisal District office. There is no penalty during a valid property tax deferral period. However, a tax lien may still be placed against the property. Interest continues to accrue, but no penalty many be imposed during a deferral period.

A tax deferral does not eliminate the need to pay the taxes eventually. It allows them to be paid at a later date, but they must still be paid (with interest). The deferral procedure is quite different from the 65-plus tax exemption. Deferral is not a tax reduction, while the exemption does indeed reduce the amount of taxes owed.

Anyone who has taken on a reverse mortgage, a home equity loan, or who still has a standard purchase mortgage on their home is not eligible for a tax deferral. Yes, the statute allows the deferral but the borrower has signed a contract agreeing to pay all taxes when due. Seeking a deferral under those circumstances would be a breach of contract that would allow the lender to foreclose on the home.

Tax Abatement

"Abate" means to stop an already existing tax collection lawsuit. This only happens if the taxing authority has already sued to collect back taxes, and the homeowner wants to stop them in their tracks. Abatement is granted only to persons 65-plus or disabled.

To receive an abatement, the homeowner must file form 33.06 with the court that has jurisdiction over the tax collection lawsuit. The tax authority can try to disprove the right to abatement, but the final decision is the Judge's. If the tax authority raises no objection, the collection lawsuit is suspended until the home is sold or the homeowner no longer occupies the homestead property.

Filing for abatement does not forgive the taxes. The collection authority can still place a lien against the home but cannot act to enforce it at that time. In the future, the tax dispute must still be settled and the taxes must still be paid.

Capital Gain Exemption

A homestead, like any other investment, is a capital asset. Typically, when a capital asset is sold, the seller pays federal income tax on the "capital gain"—that is, the difference between the basis and the sale proceeds.

Unlike other capital assets, Congress has granted homesteads special tax treatment. Married couples may sell their home and exclude any capital gain on up to $500,000 profit. An unmarried person may exclude up to $250,000. However, these rules must be followed:

- The taxpayer must own and live in the home for 2 of the last 5 years;
- A married couple must file a joint income tax return for the year of the sale; and,
- The taxpayer cannot have used the exclusion to sell another home in the last two years.

The exclusion can be used every two years, over and over, each time a homestead is sold.

There are two situations where it is legal to claim a prorated exclusion if the owner has not yet lived in the house for two years: 1) if the owner must move early because work requires relocation, or 2) if the owner's

poor health forces them to move to a licensed nursing home.

The proration is calculated by dividing the number of months the house is occupied during the last five years by 24 months. If the owner lived there for 14 months, the ratio would be 14/24 of the $500,000 available – or $291,666. If the house is selling for $400,000, and the basis is $190,000 the $210,000 gain is free of capital gain tax because it is less than the allowable exclusion.

Exemptions from Judgment

The Texas Constitution and Texas Property Code make a homestead legally exempt from claims of most creditors. If, for example, a person gets into a dispute over payment of a large bill and the creditor obtains a court judgment requiring them to pay, the creditor cannot collect against the homestead.

The homestead is exempt even if title has been transferred into a Living Trust, but only following if the rules in section 41.0021 of the Texas Property Code. First, the Trust must be written and must either 1) be revocable without having to get a third party's consent, 2) allow its creator to assign ownership of the home at will, or 3) allow its creator to reside in the home as primary residence without paying any rent to the Trust. Whichever of those conditions exists, it must be set up to exist for the entire lifetime of the Trust's creator, or for a specific term of years, or until the trust expires by its own terms. Finally, there must be a Deed from the creators to the Trustee of the Trust, and that Deed must

properly describe the real estate and must be recorded with the county clerk.

The Homestead: Urban or Rural

There are two types of homestead: urban and rural. If a home is located in a municipality (or its extraterritorial jurisdiction or in a platted subdivision) and is served by municipal police and fire protection and three types of utilities (choosing from electricity, gas, sewer, storm sewer, and water) then it is an urban homestead. Rural homesteads are in all the places that are not urban.

Legally an urban homestead can include up to ten acres of land and improvements. A rural homestead is defined similarly as up to 200 acres with improvements owned by a married couple, or only up to 100 acres with improvements if owned by an unmarried individual.

Valid Liens against the Homestead

Homestead protection is not universal. The Texas law allows a homestead to be taken in eight situations:

- Failure to repay a mortgage or home improvement loan. The lender can foreclose for failure to pay back purchase money or money borrowed for home improvements.
- Failure to pay taxes. The federal or local government can take the home for failure to pay taxes. As to Texas property taxes, there is specific protection for people age 65-plus: the home cannot be taken for failure to pay Texas property taxes if the owner has filed for a deferral of tax or an abatement of

collection. A federal tax lien (by the IRS) is not affected by the Texas deferral or abatement procedure.

- Placing an "owelty of partition" against the homestead. This is a debt arising through an agreement (or by court order) to recognize the different interests of persons in property upon division of the property between the persons, usually in a divorce.
- Failure to repay a loan taken to pay off a different lien against the homestead. This is sometimes done to pay-off a federal tax lien owed to the IRS. Of course, failure to pay the new loan would also end in foreclosure.
- Failure to pay a contractor for home improvements. The contractor can place a "mechanics and materialmen's lien" against the home. Both spouses must both agree to the lien in writing before work is started or materials are furnished. The contractor must also give a specific written warning in the contract that failure to follow its terms may result in the loss of the home.
- Abandonment of the homestead. If the owner surrenders their rights by walking away from the homestead, pre-existing creditors can take it. However, the owner does not surrender rights simply because of prolonged absence (especially if the owner expresses intent to return to the home). Texas jurisprudence also states that lengthy absence from home due to illness is not considered abandonment of the homestead.

- Voluntary equity loans. The homeowner can place a home equity loan or reverse mortgage against the homestead. This is a fairly new vulnerability for the Texas homestead.
- Voluntary manufactured housing loans. A buyer has the option to declare that the mobile home is real property once it is installed – that is, parked and hooked to utilities. If it becomes real property, then the seller can negotiate a lien against the mobile home and the land on which it is parked. If the buyer defaults, he/she not only loses the mobile home but can now lose the land as well.

Home Equity Loans

Texas was the last of the 50 States to authorize home equity lending, and it took two Constitutional amendments to become legal. Pushed by many banks, the Texas Legislature, Governor and Voters decided to allow exposing the highly protected Texas homestead to voluntary equity liens.

Since Texas homesteads had the highest level of protection in the nation before this law change, the legislature felt that it should design the equity lending law with some very strict consumer protection mechanisms. Among them are:

- Both spouses must agree in writing voluntarily to place the lien against the homestead. Durable Power of Attorney can only be used if the POA was signed at the lender’s office, in a law office or at a title

company[69] (another reason to avoid online preparation of legal documents!).

- Only one equity loan at a time can be put on the homestead.
- The loan cannot be for more than 80% of the home's market value. Any existing loan must be factored into the equation.
- Installment payments must be handled like a mortgage. Payments cannot be made so small that the loan balance actually grows while interest is left unpaid. Additionally, the loan must be pre-payable without penalty.
- There must be at least 12 days between the loan application and loan funding. During this time, the homeowners can change their minds. When closing time arrives, papers must be signed at the bank, at a title company, or at an attorney's office. They cannot come to the home for signing. If any party is signing as Agent for another under a Durable Power of Attorney, that Durable POA must have been signed in a lawyer's office or at a title company to be valid for this use.
- The loan cannot include personal liability for the homeowners; that is, it can only be collected by foreclosing on the house. Other assets of the homeowner cannot be put at risk. Of course, if the

[69] Finance Commission of Texas v Norwood, 418 SW 3d 566 (Tex. 2013).

homeowner has other assets he/she probably wouldn't be defaulting on the equity loan anyway.

- Closing costs cannot be more than 3% of the loan amount. Interest, however, is at market rates.

Home Equity Lines of Credit

Since 2003, Texas banks have been authorized to offer a home equity line of credit (HELOC); that is, open-ended accounts that homeowners can draw against in varying amounts at varying times.

However, Texas law imposes certain requirements. For instance, any single draw against the line of credit must be at least $4,000. Smaller amounts are not allowed. The method of making a withdrawal must be by direct contact with the lender; credit cards, pre-authorized checks, and debit cards are not allowed.

One good feature is that the bank can only charge a fee when the loan is originally established. There cannot be an additional fee each time a draw is made on the line of credit.

How much credit can be offered? By law, the total loan cannot exceed 50% of the fair market value of the home as it was determined when the loan was established.

Similar to regular home equity loans and mortgages, repayment is made during the homeowner's lifetime. The bank cannot legally require payments more often than every 14 days, nor less often than monthly. Payments can be delayed for a short initial period of two months for the first extension of credit.

These are the highlights. There is a lengthy list of other rules that must be followed. If you apply for a home equity loan, all the rules must be provided to you in words mandated by the law.

Equity Loans Expose the Home to Liability

Some people may be tempted to convert a high interest unsecured loan (like a credit card debt) into a low interest secured home equity loan. An unsecured loan is based on your promise to pay, but is not linked explicitly into the things that you have purchased. A secured loan is attached by a lien to a specific asset. Failure to make the payments on a secured loan puts that asset at risk of seizure after proper legal procedures have been followed.

Many banks push home equity loans, and they can be useful in the right situation. Conversion of an unsecured loan may make sense if you will have no trouble paying the loan. But if you are at any risk of going into default (poor health, tough economic times) you must protect your home above all other obligations. If you go into default, a credit card company that gave you an unsecured loan cannot sue to take away your home, but a bank that gave you a secured home equity loan can take away your home.

Reverse Mortgages

The other category of home equity loans is the reverse mortgage. One of the spouses need be 62+, the other can be younger.

Reverse Mortgages are often of greatest interest to Seniors who have acquired extensive equity in a home in which they have lived for many years. These mortgages allow monthly payments to be made from the lender to the homeowner. The owner can spend the money for any purpose.

If the lender fails to live up to its end – if it fails to make loan advances as contracted and does not cure its default as required in the loan contract – then the lender forfeits all principal and interest of the reverse mortgage.

Before Obtaining the Reverse Mortgage

Texas law and federal lending regulations restrict reverse mortgages to people age 62+, or whose spouse is 62+. In addition, these rules must be followed:

- The lien must be voluntary and both spouses must sign it. It is not possible for only one spouse, acting alone, to place a lien against the homestead unless that spouse either a) has a Durable Power of Attorney from the other and that Durable Power of Attorney was executed in a lawyer's office or at a Title Company, or b) is the court-appointed Guardian of the other.
- The loan must be without recourse for personal liability against each owner.
- The lender is not allowed to reduce the amount or the number of advances because of an adjustment in the interest rate if periodic advances are to be made.
- The Texas Constitution requires that before signing a reverse mortgage, the prospective borrower *and*

the prospective borrower's spouse must attest in writing that they received counseling on the advisability and availability of reverse mortgages. The counseling must include a discussion of other financial alternatives. This requirement could, arguably, eliminate the availability of a reverse mortgage for married couples where one of the spouses is incapacitated.

Repaying the Reverse Mortgage

Assuming the lender fulfills its obligations, the loan must eventually be repaid – but not until either:

- All of the borrowers have died;
- The homestead property securing the loan is sold or otherwise transferred;
- All borrowers cease occupying the homestead property as a principal residence for more than 12 consecutive months without prior written approval of the lender; or,
- The borrower: (a) defaults on an obligation specified in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; (b) commits actual fraud in connection with the loan; (c) fails to begin to occupy the premises (if the mortgage was for the purchase of a new homestead) within the time specified in the mortgage contract; or, (d) fails to maintain the priority of the lender's lien on the homestead property, after the lender gives notice to the borrower, by promptly discharging any lien that has priority or may obtain priority over the lender's lien

within 10 days after the date the borrower receives the notice, unless the borrower: (1) Agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to the lender; (2) Contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings so as to prevent the enforcement of the lien or forfeiture of any part of the homestead property; or, (3) Secures from the holder of the lien an agreement satisfactory to the lender subordinating the lien to all amounts secured by the lender's lien on the homestead property.

Death of the Borrowers

Assume that the reverse mortgage worked exactly as planned, all the proper benefits were received by the homeowners, but now both of the homeowners have died. By the terms of the mortgage, it must now be repaid. What happens?

First, the family should inform the lender that both borrowers have died. Second, title to the house must be passed according to the borrowers' estate plan, such as passing through probate. When the first spouse died, that spouse's Will should have been probated so that title vested in the surviving spouse. When the second spouse dies, that spouse's Will must also be probated. The Executor named in the Will must receive letters testamentary from the court, and must again contact the lender to discuss arrangements.

Typically, the lender will offer a six-month grace period. During that time, the Executor must either 1)

arrange to deed the house to the heirs, who will at the same moment pay the reverse mortgage in full by obtaining a new loan or by using their own savings to pay the loan, or 2) sell the house and apply part of the proceeds to paying off the mortgage balance. If the heirs cannot afford to pay the loan and cannot qualify for a new loan, then the house must be sold. If the Executor does not take action to sell, the lender can foreclose.

What happens if the heir (maybe the couple's only child) lives in the home and cannot afford to pay the loan or qualify for a new loan? The heir will have to sell the house or lose it in foreclosure, and cannot continue to reside in the house as the parents may have hoped.

Equity Loans and Cooperative Units

Will a member of a Homeowner Cooperative be able to place a reverse mortgage or home equity loan on his unit?

The answer appears to be "NO". Under Texas law, someone who buys into a cooperative is a "subscriber" and owns a share in the project. This ownership entitles the subscriber to reside in a unit of the project. The Cooperative Association, however, owns the real property.

It may appear to the subscriber that the unit is their homestead, but it is not. The Association owns the unit. The subscriber owns stock. Stock cannot be a homestead.

Why then do subscribers receive TAX BILLS that identify the property as their homestead? Because special tax breaks were written into the Texas Tax Code for Cooperatives. Although the Cooperative Association owns the units, they are appraised separately so that each owner knows their share of the taxes. The Tax Code then allows the subscriber the same tax breaks that would be available had the subscriber purchased a freestanding homestead.

A coop is not a homestead for other purposes. Texas law requires a homestead to be composed of real property. People who own an interest in a Cooperative Housing Association do not own any real property. They own shares in the Association. This entitles them to lease a unit for their residence, often with a "proprietary lease" for their unit. While the interest of the resident is legally binding, it is not a homestead interest.

Personal Property Exemption

In addition to the homestead exemption, Texas law provides a personal property exemption. While the personal property exemption is less well known than the homestead exemption, is still very important. It shelters personal necessities by forbidding the authorities from seizing, garnishing, attaching, or executing against a very specific list of items—even to satisfy a court judgment.

Under current law, a family is allowed to shelter assets with a market value up to $100,000. A single adult is

limited to $50,000 value[70]. Over and above those limits, the law forbids the authorities from seizing current wages and from seizing "professionally prescribed health aids". This means that if a person has special medical equipment in their home for an ill family member, the equipment is exempt from seizure regardless of its value.

You are allowed to protect any combination from the following items, up to the value limit mentioned above:

- Home furnishings and family heirlooms, foodstuffs, tools, equipment, books, and vehicles used in your trade, farm or ranch vehicles, implements, some livestock, clothing, jewelry (so long as it does not exceed ¼ of your limit), two guns, pets, a vehicle for each driving member of the family, and athletic equipment.

Insurance, Retirement Funds, and 529 Plans

Other laws[71] shelter all insurance benefits from seizure to satisfy a judgment. These shelters specifically protect money, policy proceeds, and cash values that come from insurance.

---

[70] Texas Property Code, Section 42.001

[71] Texas Property Code §42.0021 & 42.0022 and Insurance Code §1108.051

There is one exception: an insurance company may keep any part of the insurance proceeds allowed by the policy. This might be used, for instance, to pay off a loan against a whole life policy or to collect back-due premiums. Other than that, no one may legally claim any money from the insurance except the owner or the beneficiary.

The protection for an insurance investment is broad. It includes any insurance policy issued by a life, health, or accident insurer (including fraternal societies like Hermann Sons). It also includes an annuity or benefit issued by an employer. Hence, a retirement annuity is exempt and cannot be seized to pay a judgment lien or a bankruptcy claim.

Texas law also protects—to a large degree but not absolutely—assets held in, and the money the owner can take as withdrawals from, any plan, contract, or account that qualifies under the Internal Revenue Code as:

- A Stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals;
- An Annuity or similar contract purchased with assets distributed from the above type of plan;
- A retirement annuity or account that is qualified under section 403(b) of the Internal Revenue Code; and
- Any individual retirement account or any individual retirement annuity (IRA) including a simplified employee pension plan (SEP) and a Roth IRA;

- A Health Savings Account; and,
- College savings plans – both 529 plans and prepaid tuition plans (like the Texas Tomorrow Fund).

CONSUMER PROTECTION

Deceptive Trade Practices-Consumer Protection Act

A seller of goods or services cannot legally use any type of deceptive tactics. If a buyer is deceived and it causes monetary or physical damage, Texas law may allow the buyer to make a claim against the company that caused the harm.

This Act defines a wide variety of prohibited schemes as "deceptive". Among these are:

- Taking advantage of a consumer's lack of knowledge, experience or capacity to an unfair degree;
- Telling a customer that work has been performed on or parts replaced in goods when the work was not performed nor the parts replaced;
- Making misleading statements concerning the need for parts, replacement, or repair service; and,
- Telling a customer that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or second hand.

Before you can take legal action, the law requires that you give the business a written notice of your complaint

and the amount of damages. The business has a chance to offer a settlement—but if they do not make an offer, or if you reject their offer, then you may sue the business 60 days after you sent the original notice.

Consumer Protection Division

For a Broad Range of Consumer Problems

In any given consumer protection situation, if a consumer is not ready to take legal action they can contact the Texas Attorney General's Office. They have a "Consumer Complaints" division at 1-800-621-0508.

The Consumer Protection division can also take direct action against a company it thinks is violating the law. They can seek an injunction and monetary penalties against companies that act deceptively.

The legislature, aware that deceptive business practices are especially harsh when the victim is elderly, imposed a special penalty. If a Judge rules that a company has violated the Deceptive Trade Practices-Consumer Protection Act by preying upon the elderly, the Attorney General can seek a fine of $10,000 per occurrence, with a maximum fine of $100,000. (Here, "elderly" is anyone 65 or older).

Compared to the standard fine of only $2,000 per occurrence with a cap of $10,000, this penalty should be a significant deterrent to deceptions that focus on the elderly. Is it? Perhaps one of the most nefarious deceptive schemes practices against the elderly is the sale of "Living Trusts" by unlicensed businesses. When

this issue was raised by a State Senator, the Attorney General's office acknowledged the problem but refused to take any enforcement action. A complaint to the Attorney General may not result in any action, but may still be worthwhile as a way to get your complaint on the record.

Home Solicitations

Consumers are legally able to cancel many in-home sales within a few days after the purchase[72]. This legal right to rescind helps consumers avoid the pressure wielded by a salesperson sitting in their home. The purchase can be real property, personal property, or services – but the sale must be for personal, family, or household purposes. The law does not cover any business-to-business transaction. (And although "in-home" is the usual setting, the law actually applies to any consumer transaction above $25 that takes place outside the merchant's place of business).

Individual consumers can cancel an in-home sale until midnight of the third business day after agreeing to purchase the items. The salesman is required by law to provide a pre-printed "notice of cancellation" so the consumer can more easily exercise their rights. Failure

[72] Texas Business and Commerce Code, Title 12, Chapter 601

to give the pre-printed form is defined by law as a deceptive trade practice.

There are a few big exceptions to the home-sales law. First, any sale of insurance is exempt from the law. There is no three-day right of cancellation if a consumer buys an insurance policy at home, including annuities. Second, any transaction that was started at the seller's place of business but that is closed at home is exempt. Third, any in-home transaction where the consumer's attorney is present is exempt, or when buying real estate and the consumer is represented by an attorney or a licensed real estate broker. Finally, any transaction by phone, even though done at home, is exempt.

If the law covers the sale and the merchant delivers the goods during the three-day cancellation period, the buyer can still cancel. The buyer must, however, return any goods to the merchant when payment is refunded. The merchant is not entitled to any compensation for the services provided before the three days have passed.

The consumer must take reasonable care of any goods that are to be returned. The law, however, does not require that the consumer to deliver the goods to the merchant. Ordinarily, the merchant must come get the goods back from the consumer's home.

Phone Solicitations

Texas Law also regulates computerized telephone calls. It is illegal for any business to use a machine to solicit a person unless:

- The machine immediately identifies the caller by name, tells what business is being represented, tells the purpose of the call and gives a phone number where the consumer can contact the company making the call;
- The call is made between the hours of 9 a.m. and 9 p.m., except on Sunday when they must be between noon and 9 p.m.; and,
- The machine releases the consumer's phone line within 30 seconds after hanging up.

Texas and federal law also allow consumers to reject telephone solicitations by registering with the "do not call" lists. The Texas list applies to any telephone marketer calling a Texas residential or wireless phone number. Registration is valid for 3 years. Get on the list by mail or by phoning 866-896-6225 or on the Internet. Online registration is free, but phone or mail registration costs $2.55 for each phone number you list.

Illegal Debt Collection Practices

What if a person gets into financial hot water, and has trouble paying their bills? It is legal for a creditor to hire a collection agency to contact the debtor, but there are limits to what they can do.

A debt collector cannot harass the debtor. Texas law limits the actions a debt collector can take. It is illegal to 1) threaten or use violence, 2) falsely accuse the debtor of fraud or other crimes, 3) threaten that the debtor will be arrested for failure to pay the debt, or 4) to harass the debtor.

When communicating with the debtor, it is illegal for the collector to "oppress, harass, or abuse" the debtor. The collector:

- May not use profane or obscene language;
- May not phone the debtor without providing identification; and,
- May not call the debtor on the phone repeatedly or allow the phone to ring continuously.

If the debt collector violates these laws, the collector has committed a misdemeanor. The debtor can also sue the collector for deceptive trade practices. Violations can be reported to the Texas Attorney General's office.

Federal law also provides some protection. If a debtor gets repeated calls from a collector, the debtor can instruct the collector in writing to communicate only in writing, or to stop communications with you altogether. After that, all calls and letters must stop (except that the collector can send one letter saying "see you in court").

What if money is owed, but the collector has the facts wrong? The debtor acknowledges owing $200 – but the collector is demanding payment of $845? The debtor has the right to contest the accuracy of the collector's information. The law requires the collector to provide forms and to assist filling out the forms.

Once a written notice that you contest the accuracy of the collector's information is submitted, the collector has 30 days to investigate. If the collector decides the debtor is correct, the problem must be fixed and a

corrected statement must be sent to anyone who got the false information.

If the collector decides that the information was correct, the collection efforts can go forward. If the investigation has not been completed in the 30 days allowed the collector must 1) stop all collection efforts, 2) presume that the debtor's information is correct, and 3) send the corrected information to anyone who got the false information.

The Automobile Lemon Law

When buying a new car, a consumer expects it to work flawlessly. What are the buyer's legal rights if the new automobile is a lemon?

Legal rights are contained in the manufacturer's warranty as modified by state law. Car warranties vary in coverage, but they must meet the minimum standards set by state law. If the new car spends too much time in the shop for repairs, even warranted repairs, the consumer may be protected by your state's "Lemon Law"[73].

---

[73] Texas Occupations Code, Chapter 2301 and 16 TAC 107.1-107.11

A car dealer cannot require you to waive your rights under the provisions of the Lemon Law, and any attempted waiver is void.

A consumer qualifies for protection under the Texas Lemon Law if:

- The car is repaired for the same problem four or more times within the first year after purchase; or,
- The car spends more than 30 days in the shop (for any combination of repairs) during the first year after purchase. But even so, the dealer gets credit against the 30 days for any days he provides a “loaner” car that is similar to the new car.

The consumer must establish that the defects have significantly impaired the ability to use the car and have reduced the market value of the car. These conditions are easily met when a major problem like engine trouble recurs.

When all the law’s conditions are met, the first step should be to mail the dealer a “notice of non-conformity”. The notice tells the dealer that the car has not met the warranty standards. If the trouble is not fixed, the consumer has the right to either:

- Have the car replaced with a similar vehicle; or,
- Obtain refund of the purchase price, less an allowance for the use received from the car.

If the dealer resists, get help from the Texas Motor Vehicle Commission in Austin. The Commission can

hold a hearing, and might order the dealer to replace the car or to refund your money.

If the Commission's help is desired, the consumer must start the proceedings before owning the car for 18 months or within 6 months of the end of your warranty. Otherwise, they cannot assist.

Voting Rights

Voter ID Requirements

The Texas Legislature passed a voter identification law in the 2011 session, intended to be effective January 1, 2012. The law has been ruled to be unconstitutional in federal court, but as of this writing the courts are still determining what steps Texas must take. It appears that the law may be modified to cure its discriminatory effects.

The Voter ID law requires any voter to show a photo ID from a limited approved list. The only types which are legally allowed are 1) a Texas personal identification card issued by DPS, 2) a Texas concealed handgun license, 3) a US military ID card containing your photo, 4) a US citizenship certificate containing your photo, 5) a US passport, or 6) a special Texas Election Identification Certificate (EIC) issued by the DPS. Court order may require that people without these IDs may still vote by signing an Affidavit at the polling place.

Katie's Law creates disadvantage

Seniors are specifically disadvantaged (for voter ID purposes) by "Katie's Law" that requires anyone 79 or older to appear in person to renew a driver's license, and to pass prescribed fitness tests related to driver safety (but not related to ability to vote). It also provides that the license of anyone age 85 or older expires on the second birthday after the date of the license application. For example, if someone gets a license renewal at age 84 then the driver must appear and be tested at age 86. Failure to appear, or failure to pass the exams, means the voter will not have a driver's license. No license equals no voting, unless you get one of the other approved IDs.

Provisional Voting and Exceptions

The Texas Voter ID law says if a voter does not have proper photo ID they will be allowed to cast a provisional ballot. However, for it to be counted the voter must present a valid photo ID to the county election office within 6 days of the election. For many Seniors, that sets a deadline that is too short and is a hassle that may just cause them to skip voting.

The law does provide four exemptions from the Voter ID requirement.
1) A voter may claim a religious objection to having their photo taken. That voter casts a provisional ballot, then travels to the Election Office within 6 days to sign an affidavit claiming the exemption. If no appearance is made, the vote is discarded.

2) A voter may have no ID due to a natural disaster (as declared by the President or the Governor). Again, the voter casts a provisional ballot, then travels to the Election Office within 6 days to sign an affidavit claiming the exemption. If no appearance is made, the vote is discarded.
3) If a voter is disabled under Social Security law or has a VA disability of at least 50%, and has no photo ID, they can vote by presenting a voter registration card and written proof of the disability issued by Social Security or by the VA.
4) A person may be able to vote by mail. In order vote by mail, a registered voter must either a) be planning to be away from the county on Election Day and during the entire early voting period for that election, OR b) be in jail but still eligible to vote, OR c) be age 65 or older on Election Day, OR d) be disabled.

There is no requirement to present a photo ID in order to vote by mail. Instead, the voter must submit a written application for a mail-in ballot to the county elections department. The application must be submitted between 60 days and 7 days before Election Day.

Accessibility for Elderly or Disabled Voters

State law requires all polling places to be accessible. The standards for what constitutes an accessible polling place include: a) all polling places must either be on ground level with a street entrance or be accessible by an elevator with at least 36-inch wide doors, b) curbs and stairways must have permanent or temporary ramps, and c) entrances cannot be made inaccessible by

gravel, automatic gates, or other barriers that block access to the polling place.

In addition to making the polling place accessible, Texas law requires:

- That a friend or aide may assist a voter in reading or marking a ballot;
- That all polling places have voting equipment that accommodates those with vision or hearing deficits, limited dexterity or strength, or low mobility. The law requires a Direct Recording Electronic device (DRE) at each polling place to enable paperless, computerized voting to maintain secrecy;
- That a person may vote from their vehicle curbside if that person is physically unable to enter the polling place. The Secretary of State recommends that if you need to use this option, you call ahead so election officials will expect you. Call 800-252-VOTE or your local voting office;
- That early voting be available at convenient neighborhood locations to avoid the long lines and crowds that may be present on election day; and,
- That voting by mail be available for those who are ill, disabled or 65+ (or who expect to be away from home on Election Day and early voting days). Voting by mail used to be called "absentee voting" but those restrictions were legally lifted to make the process available to a wider group of voters.

CRIMES AGAINST SENIORS

Although criminal laws are enforced by the state (through the various police forces, District Attorney's offices and Courts) and not by individuals, they do afford extra protection for the Elderly.

Various Texas laws define "elderly" in different ways. The Bill of Rights says that an elderly individual is anyone 60 or older. The legal definition for Adult Protective Services and under the Texas Penal Code says that only persons 65 or older are elderly.

Several statutes criminalize certain actions against 65+ elderly, or enhance the punishment when the action is against a Senior.

Injury to a Senior: Caregivers Beware

Under the Texas Penal Code, a person commits a crime if through an action they intentionally, knowingly, recklessly, with criminal negligence, or by omission causes an elderly individual bodily injury or serious mental deficiency, impairment, or injury.

Notice that it can be either an "act" – that is, doing something – or an "omission" – that is, not doing something, that gives rise to the crime. But, an *omission* that results in injury to a Senior is only criminal conduct if the person who failed to take the action either:

- Had a legal or statutory duty to act and failed to act; or,

- Had accepted responsibility for protection, food, shelter, and medical care for an elderly individual (and the law says that "responsibility" is "accepted" if that person's actions, words or conduct would lead a "reasonable person" – meaning a Judge or jury – to conclude that responsibility was accepted).

Intentional or knowingly violating this law is a first-degree felony. Recklessly violating the law is a second or third degree felony, depending on the harm done.

If a caregiver fears this law and wants to avoid committing a crime, the caregiver can withdraw from providing care to the elderly individual. The caregiver can either:

- Notify the elder, in person or in writing, that the caregiver is no longer responsible. The written notice must give all the information required by this law; or,
- Notify the Texas Department of Family and Protective Services that the caregiver is no longer responsible.

Fraud Against or Theft from a Senior

It is a crime in Texas to cause another person, by deception, to sign any document affecting property or services or the pecuniary interest of any person with intent to defraud or harm the person. Likewise, it is a crime to steal property belonging to another person. When the injured party is elderly, the punishment is enhanced. For instance, fraud or theft that causes $500

to $1500 in damage is ordinarily a Class A misdemeanor, but when the victim is elderly the same act is a State Jail felony.

Sexual Assault

In Texas, it a crime for an employee of a long-term care facility one of its residents to engage in sexual conduct with one of its residents. The law presumes that the patient has not given consent for the sexual conduct, which creates grounds for charging the employee with criminal assault. In this context, a "long-term care facility" includes any nursing home, adult day care, assisted living center and mental health facility. The only legal exception is if the employee and patient are married.

DRIVING AN AUTOMOBILE

Safety First

A driver's license is precious because it provides independence. But, independence must be weighed against other precious essentials: life and safety.

What if a person can no longer safely drive a car? Perhaps it is a specific illness that causes troubles – like a diabetic who might "black out" for short periods if blood chemistry is out of balance. Maybe it is old age – slower reflexes, poor vision. Is driving a risk worth taking?

A car can be dangerous if used incorrectly. The adage that "driving is a privilege, not a right" is generally true. In order to drive, a person must have a driver's license. In order to get and keep a valid driver's license, a person must meet the requirements of Texas law.

Katie's Law

In Texas, "Katie's Law" requires all drivers age 79 and up to renew their license in person at a local Department of Transportation office[74]. The applicant will be asked to take a vision test, and may be asked to take a written test as well.

People age 85 and older must renew their license in person every two years (instead of the six-year renewal allowed for everyone else). Additionally, if the examiner has concern about an applicant's ability to safely operate a car, the applicant can be required to take a driving test as well.

The Texas Transportation Code regulates issuance and revocation of a driver's license. A driver's license may be revoked if:

- A person is found by a court to be incapacitated. If Guardianship is granted over a ward, the Judge can take away the ward's driver's license;

[74] Katie's Law, Texas Transportation Code §521.2711

- A person is, in the opinion of the Department of Public Safety (DPS), incapable of safely operating a motor vehicle; or,
- A person fails to provide medical records or has failed to undergo medical or other examinations as required by a panel of the medical advisory board.

Texas Medical Advisory Board

The Medical Advisory Board was created to assist DPS with physical or mental disability decisions.

How do they find out about a driver's disability? When a driver applies for license renewal, they are supposed to reveal to the DPS any medical condition that might hamper their ability to drive safely. This may be used against the driver later. Also, a physician who feels a patient is incapable of safely operating a vehicle can make a report to DPS or to the Medical Advisory Board. That report is legally not a breach of the patient-physician privilege, because public policy seeks to protect the community from unsafe drivers.

If the panel decides the driver's disabilities make their driving unsafe, the license can be revoked or suspended. The panel can require the driver to submit to a medical examination. Refusal to submit to a required examination is grounds for revoking the driver's license, whether or not there are any physical disabilities that make their driving dangerous.

The final say in the revocation process comes from the local Justice of the Peace or Municipal Judge. If all the

evidence indicates the person's driving is dangerous, the Judge will revoke their license. The safety of pedestrians and other motorists take priority to any driver's convenience.

Convincing a person to stop driving can be a very difficult battle. If you feel your spouse or parent is no longer a safe driver, consider these strategies:

- Discuss your fear of personal liability. The Senior may not care about putting themselves at risk, but may think twice about putting you and others at risk.
- Talk to the Senior's insurance company to see that the Senior has adequate liability coverage. Texas law requires minimum insurance levels, but may be wise for them to have higher coverage amounts. The cost will be pricey, but driving has always been expensive.
- Suggest that the Senior enroll in a defensive driving course for their own safety. Either their driving skills will improve, or the realization will emerge that they cannot safely handle big city traffic.
- Offer some reasonable transportation alternatives. The family can team up to drive when and where the Senior wants to go. Look into public transportation, taxi service, neighborhood organizations, or moving to an assisted living facility that offers transportation services. The local area agency on aging can provide details of other transportation services available in your area.

Remember: when it comes to driving, there is more at stake than independence. Health and safety – of the

driver, people sharing the road, and pedestrians – must come first.

EMPLOYEE RIGHTS

Civil Rights Division, Texas Workforce Commission

In Texas, the Civil Rights Division of the Texas Workforce Commission handles employment discrimination claims.

Employment discrimination is outlawed—whether based on sex, race, religion, disability, or age. However, age claims are available only if the employee is age 40 or older. Younger people cannot claim age discrimination. Additionally, the law applies only to companies with 20 or more employees.

An employee cannot be forced to retire due to age unless the employee is an executive of the firm and has a guaranteed pension of at least $27,000 annually. If this cushion exists, the employee can be forced to retire starting at age 65.

If a covered employee suspects discrimination based on their age (for instance, being passed over for a job promotion) they have the right to complain to the Texas Workforce Commission.

The process begins with an "intake questionnaire" being filed with the Commission. They will then review

it to decide if a claim exists. If they feel there has been discrimination, they will prepare a complaint form for the employee which must be signed before a notary and returned to them within 10 days. It must be filed within 180 days of the time of the alleged discrimination, or the Commission will dismiss it.

Equal Employment Opportunity Commission

The federal Age Discrimination in Employment Act (ADEA) also bans arbitrary age discrimination in hiring, firing, paying, and promoting employees age 40 or older. It bans discrimination in providing fringe benefits like pensions and health insurance, and regulates mandatory retirement age rules. It applies, however, only to companies that had 20 or more employees during a portion of the prior year.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing this law. Charges must be filed with EEOC within 180 days of the alleged discriminatory act. The EEOC website is found at www.eeoc.gov, and their phone is 800-669-4000.

VOLUNTEER PROTECTION

Non-Profit Corporations

The Texas Charitable Immunity and Liability Act[75] is meant to encourage volunteerism. People who are worried that their volunteer actions will be repaid with a lawsuit and liability find relief in this law.

The Act protects volunteers at a non-profit agency from liability if something goes wrong – but only if the agency and volunteer meet all the legal qualifications.

Under the law, a “volunteer” is someone who works for an organization without being paid (except for expense reimbursement). This specifically includes a medical professional who is working without pay for a charitable organization. On the other hand, an “employee” is not a volunteer because they are paid by the organization. If an officer or director is paid, that person is an employee; if unpaid, that person is a volunteer.

Volunteers are legally protected and immune from civil liability for any act or omission, even if it results in someone’s death, or injury, or in property damage so long as:

---

[75] Texas Civil Practice and Remedies Code, §84.001 et. seq.

- The mishap occurred while the volunteer was "acting in the course and scope" of his duties for the organization; and

- The volunteer was acting "in good faith". Good faith means "honest pursuit" of the activities the organization was created to provide.

If the volunteer is providing licensed medical services, the patient must sign an agreement acknowledging that the medical care is being provided for free, and waiving any recovery for damages if something goes wrong.

Volunteers are not protected from liability if:

- An injury results from a volunteer's intentional, willful or wantonly negligent act; or,
- An injury results from an act done with conscious disregard for the safety of others.

If the mishap occurs while the volunteer is operating a vehicle then the volunteer is legally liable, but only up to the level covered by existing insurance. Texas law requires all vehicle operators to have liability insurance with the following limits: $30,000 for injury or death of one person, $60,000 for injury or death of two people, and $25,000 for property damage arising out of any one accident.

These protections apply only for volunteers at an agency that meets certain criteria. Most tax-exempt organizations under the Internal Revenue Code qualify

(though the law does specifically exclude fraternities, sororities, and secret societies).

The organization must also have adequate liability insurance. Texas law requires the organization to carry liability insurance that covers $1,000,000 for personal injury and $100,000 for property damage. If it fails to do so, then the organization and its employees do not have immunity (but the volunteers are still safe).

Federal Volunteer Protection

The federal Volunteer Protection Act offers protection to any volunteer who may be liable, and restricts the recovery rights of any plaintiff who files a lawsuit. Additionally, if state law offers more protection to a defendant, the state law will apply.

Under the federal law, a volunteer cannot be sued unless the volunteer is:

- Acting outside the scope of their responsibilities;
- Engaging in "willful or criminal" misconduct;
- Not properly licensed to perform the actions that caused the injury; or,
- Driving a vehicle. (Note that Texas law does protect volunteers who are driving if the volunteer has adequate insurance. Texas limits liability to the amount of the insurance policy. If there is no policy, there is no limit.)

A volunteer is still liable for any act that is otherwise criminal (including violent crime, international

terrorism, any hate crime, a sexual offense, a violation of civil rights or any crime involving intoxication or drug use).

Medical Emergencies

The best interest of the public is served when citizens are ready and willing to help in an emergency. Texas law is designed to protect volunteers who provide help when someone is having a medical emergency[76].

A person who makes a mistake while rendering emergency medical care bears no liability for that mistake, so long as:

- The mistake was not willfully or wantonly negligent;
- The aid was rendered "in good faith;" and,
- Even though the person giving aid may have been legally entitled to payment, in this instance there was no expectation of being paid.

If a licensed medical professional renders aid with the expectation of being paid, the professional is not legally immune. Hence, no volunteer protection is granted under this law to professional emergency room personnel, to someone who represents a business that

[76] Texas Civil Practice and Remedies Code, §74.151

hopes to be paid for the services, or to an admitting physician in the hospital.

Public policy, supported by the law, is clear: volunteers are encouraged to step in and render aid when a stranger needs assistance. Even though this law exists, caution is due; use your best judgment and call 911 immediately if you observe a medical crisis.

PART 13: Upon Death - Immediate Actions

When someone you love has died you may feel agony, fear, abandonment, guilt, relief, despair… maybe all of them. Certainly you feel overwhelmed. At this time of vulnerability, decisions must be made, the family must be notified, and the funeral must be held.

This part deals with the issues a surviving family member, particularly a surviving spouse, may face *before* contacting an attorney about probate.

Location of the Death

Home Death

Due to the availability of hospice care, more families are experiencing the death of a loved one at home. Hospice attempts to provide pain management and comfort care, without either delaying or promoting death. This acknowledges a trend in modern medicine to recognize death as an inevitable outcome in certain situations.

Legal Documents to Prepare Before Death

As discussed earlier in this book, the family can arm itself with several legal documents:

- An out of hospital Do-Not-Resuscitate (DNR) order can be used in the home to avoid any attempt by EMS to resuscitate the deceased;
- A Directive to Physicians and a Medical Power of Attorney can be used to enact the patient's wish that life sustaining treatments be withheld or be withdrawn, allowing death to arrive without medical intervention;
- In some states (Washington, Oregon, California and Vermont) statutory law allows "death with dignity," requiring various signed declarations from one or more physicians; and,
- An Appointment of Agent to Control Disposition of Remains.

Who Should Be Contacted?

When the death occurs at home, there are several options on who to contact:

Hospice

If the death was expected, perhaps hospice has been arranged. If the hospice nurse is already on the scene, then the death is an "attended" death and it may be possible to avoid calling the police or to EMS. If not, call the hospice to report the death and follow their advice.

EMS

No matter how well prepared a caregiver may be, the actual death often elicits a call for emergency medical personnel. This is when the survivor should be armed with the DNR order, the decedent's photo ID, the Directive to Physicians, and a strong opinion that the body should not be disturbed. EMS often wants to transport the remains to the hospital, where a physician examines the body and certifies the cause of death. Instead, the police can be called to the scene to determine the proper procedure.

The Police

If the death was natural and expected, the police will fill out a report and contact the funeral home. If the death occurred under unusual circumstances, they will investigate and contact the local medical examiner, who may transfer the remains to the medical examiner's office. The goal is to determine the cause and manner of the death. A Medical Investigator may investigate the scene of death and interview witnesses and medical caregivers. If the Investigator determines that the case belongs in the Medical Examiner's office, an autopsy may be the next step. If an autopsy is not indicated, the Medical Examiner may collect body fluids and tissue for toxicology analysis.

The Funeral Home

If the death is expected, the survivor may simply call the funeral home if prearrangements have been made. The funeral director will arrange for the body's

transportation, for a final examination, and certification of the death. If there are no prearrangements with a funeral home, it is entirely appropriate to do some comparison shopping. A rushed choice is an expensive choice. There should be no rush to remove the decedent's remains because family members may want to pay a final visit within hours of the death.

Nursing Home Death

If a nursing home resident's death is sudden, it may occur at the nursing home. Otherwise, as the resident's condition slowly worsens, the nursing home may transfer the resident to the hospital prior to death.

Nursing homes do not generally have a place to store a resident's remains. They do not want to leave the body in the room for an extended period, especially if it is a semi-private room. The survivor may be pressured to contact the funeral home quickly for transfer of the remains. If this is the case, find out if the body can be moved to the coroner's office for temporary storage while a funeral home is selected. Again, a rushed choice is an expensive choice.

Hospital Death

Death in the hospital is often referred to as an "attended death". The circumstances are known and the causes are well documented. Often the physician will certify the death and release the body to the funeral home directly from the hospital's morgue.

If a person dies in a hospital and an attending physician is unable to certify the cause of death, the manager of the institution is required to report the death to the local Justice of the Peace. At that point, an inquiry will be made regarding the cause of death.

Unfinished Medical Issues

Anatomical Gifts

Did the decedent arrange for organ donation or whole body bequeathal? Read more about organ donation cards and the willed body programs in the An anatomical gift portion of Chapter 1.

No Declaration

If the decedent did not sign a donor card, then someone in the family must give written permission if a donation is to happen. A medical professional who is specially trained will approach the family to request the donation. Texas law establishes an order of priority to authorize the donation: 1: the surviving spouse; 2: the decedent's adult child;.3: either of the decedent's parents; 4: an adult brother or sister: 5: the court appointed Guardian (if any); and 6: anyone else authorized to dispose of the body.

If permission comes from a family member and there are others of the same or a higher priority, then an effort must be made to contact those people and make them aware of the proposed gift. Also, the statute prohibits

the donation if the decedent ever expressed opposition to anatomical gifts.

After the Anatomical Gift

Once the organs are removed, the body is delivered to the funeral home and prepared for burial or cremation as directed by the family. Donation does not disfigure the body, so an open casket viewing is still possible if called for by the family's religious practices.

Autopsy

Autopsy is not required in every death. Surviving family members may ask for an autopsy, or the State may require it under certain circumstances.

Elective Autopsy

The family may be asked for permission to perform an autopsy. The statute gives a priority list for who is may give the authorization: first, the surviving spouse; second, an adult child; third, the Guardian of a minor child; fourth, a parent; fifth, the decedent's Guardian; and, finally, any next-of-kin. Note that the persons who may authorize an autopsy and the persons who may authorize organ donations are somewhat different. The spouse always has first priority. But for autopsy, the Guardian weighs in ahead of the siblings.

An elective autopsy can be expensive, and the family member who authorizes it must agree to pay for it. However, health insurance may, under certain circumstances, pay for an autopsy if they see a need for one. All accident and sickness policies in Texas contain

a clause authorizing an autopsy at the insurance company's discretion.

If the cause of death is unknown or not clearly determined, an autopsy can alert the family to health risks they can anticipate and avoid. Perhaps the autopsy will find a genetic component to the death.

Legally Required Autopsy

When the death occurs under circumstances that indicate unnatural causes or when the coroner suspects there might be a disease that poses a threat to public health, an autopsy can be required. The Texas Department of Criminal Justice (State prison system, if the decedent was an inmate) or the local Justice of the Peace can authorize an autopsy even without family consent.

If a person dies an unnatural death (from a cause other than a legal execution), if a body is found and the cause of death is unknown, if foul play is suspected, if suicide is obvious or suspected, or if the death was not attended by a physician then the local Justice of the Peace is legally required to conduct an inquest.

If a doctor who attends the death is unable to certify the cause of death, the doctor must report to the Justice of the Peace to request an inquest. The inquest must happen quickly at the place the body is found or at the place of death. The JP can hold the inquest at any other reasonable location. A body may be disinterred for an inquest. The JP decides, based on advice of the Medical Examiner or a physician, whether an autopsy in needed.

OBTAINING A DECEDENT'S MEDICAL RECORDS

By law, a person's medical records are confidential. They can only be released under certain circumstances (and the circumstances can vary widely). If a family member wants to see the medical records of a decedent, it is obvious that they can no longer get permission from the decedent. Thus, there are three valid approaches to obtaining the medical records of a decedent:

- Obtain a copy of the death certificate from the vital statistics department (of the city in which the death occurred, or if the death occurred in a rural area, from the Dept. of Health). The death certificate lists one or more causes of death. Death certificates will only be released, however, to a short list of qualified people;
- Ask the Executor of the estate (named in the Will and appointed by the probate court) to obtain the records. Medical information can be released in Texas to the patient's legally authorized representative, and an Executor fills that legal role. If the decedent did not have a Will, consider applying to the Probate court to become "Administrator" of the estate; or,
- Look for any outside source of the medical records. Was the decedent party to a lawsuit in which the medical records were an issue? There may be records at the courthouse that include portions of the medical file.

If the need to obtain the medical records is based upon the desire to file a negligence claim against a medical provider, the Texas Medical Liability and Insurance Improvement Act[77] must be followed. It says that a request for the medical records of a deceased person must be honored if it is authorized in writing by a parent, spouse, or adult child of the deceased.

Death Certificates

Although the death certificate is a legal document, its use in certain court or legal proceedings is restricted to providing proof that the death has occurred. The actual cause of death, as indicated on the death certificate, may not be accurate to the degree necessary in court – other evidence may be needed to establish accurately the cause of death for a wrongful death case or a criminal proceeding.

The vital statistics office can only issue copies of a death certificate to qualified parties. Other than designated personnel who deal with vital statistics, access to the death certificate is restricted for 25 years to immediate family members. Qualified individuals must provide verifiable proof of their relationship to the deceased to obtain information from the government.

---

[77] Article 4590i, Vernon's Texas Civil Statutes

The process of obtaining the death certificate is often transparent to the surviving spouse. The spouse answers a few questions at the funeral home regarding the date of birth, parentage, and work history of the decedent. The funeral director forwards that information to the hospital or physician who will be certifying the death. Once the doctor enters the cause of death and eSigns the certificate, the vital statistics office issues death certificates. The survivor has already paid for them at the funeral home, and typically receives them in two weeks or less.

Texas law calls on physicians to certify the death and to release the death certificate to the funeral director within 5 days from the time of receipt of the death certificate. If a physician unduly delays the processing of a death certificate, they may be charged with a Class C misdemeanor. If an autopsy or other situation delays the completion of the death certificate beyond the 5-day time limit, the Department of State Health Services recommendation is that it be marked as “Pending Autopsy” or “Pending Further Investigation” and be sent on to the funeral director.

The certifying physician has the duty to accurately document the cause of death. While physicians should recognize the potential legal aspects of death certificates and be careful when wording the cause of death statement, their focus is on the medical cause of death. The primary reason the death certificate can only be issued to qualified parties is protection of the privacy of the family and the dignity of the deceased.

This is ironic, as the survivor or Executor will be asked to deliver a copy of the death certificate to the bank, the broker, the insurance company, and others. Although they are not primarily interested in the cause of death, it is on the face of the certificate. Confidentiality is destroyed when the certificate is used in this fashion, but financial institutions will not accept any other proof of death.

Although Registered Nurses and Physician's Assistants are able to pronounce death, in certain cases, they are not authorized to appear as certifiers on the death certificate.

Funeral Issues

Paying for a funeral is often the first financial decision that must be made after the death. The first rule is: honor the decedent's wishes. These may be expressed in the Will, but most Wills do not go beyond instructing a "decent burial" or the like, and are often left unread until after the funeral. Look for a Preneed Arrangement, or an Appointment of Agent to Control Disposition of Remains.

Agent to Control Disposition of Remains

When a person dies, Texas law strongly favors any steps necessary to honor that person's wishes regarding burial or cremation. Any instructions issued in the Will must be followed, but the Will is often overlooked until after the funeral. A better choice is to preplan the funeral and

already have arrangements made. Also, the Texas Health & Safety Code[78] allows a document called an *Appointment of Agent to Control Disposition of Remains*. This is a special Power of Attorney that takes effect at the moment of death, which is very unusual for a power of attorney. In contrast, normal Durable Powers of Attorney end at the moment of death.

In your Appointment of Agent to Control Disposition of Remains one can appoint an individual in whom they have great confidence to see to their funereal arrangements. If the family is not their top choice, they can call on a close friend.

Always appoint alternate Agents in case the first choice is not available. And give very explicit and legally binding instructions, including the requirement of cremation or for a traditional funeral.

A skilled Attorney should write the Appointment of Agent to Control Disposition of Remains. The law requires it to contain specific clauses and wording, to be signed by the Declarant and by the Agent, and to be notarized. Do not do it by hand.

---

[78] Texas Health & Safety Code, §711.002

Emotional Vulnerability

The funeral industry, while subject to disclosure regulations, is also aware of the emotional vulnerability of many of its customers. As a survivor who needs to set up a funeral, be wary of the following vulnerabilities:

- The funeral home décor, while on the surface intended to honor the dead, may intimidate the living.
- The salesperson (called a "funeral director") may use flattery. "Given your position in the community, I'm sure you'll want…").
- The salesperson may use guilt. ("I'm sure you want the best for your …").
- The salesperson may use examples that do not apply to your situation. ("When your husband arranged his aunt's funeral, this is what he chose").
- The salesperson may call on religious or community "tradition". Is it tradition, or simply the canned package the funeral home prefers to offer?

Remember that most funeral directors are caring people, trying to do their job and help you during a difficult time. *Try telling them that if you were to spend equal to the amount you care, you would overspend.* Acknowledge your deep loss and your desire to honor your loved one, but remember that finances are important to you as your loved one's survivor.

Price Lists

Federal regulations require the funeral home to provide a general price list, a casket price list, and an outer-container price list. The same regulations allow the funeral industry to add a “funeral director’s professional services” fee to the bill. This covers overhead and general expenses for the funeral home, and cannot be declined. As such, the survivor should never worry that the funeral home may be poorly compensated if an inexpensive casket is selected. They get their money.

Government Assistance

Social Security

A one-time payment of $255 is due to the surviving spouse if they were living with the beneficiary at the time of death, or if living apart, was receiving Social Security benefits on the beneficiary’s earnings record. Being apart for medical purposes (one spouse in a nursing home) is not “living apart”. If there is no surviving spouse, the payment is made to a child who was eligible for benefits on the beneficiary’s earnings record in the month of death.

Military/VA

An honorably discharged veteran may be interred in a national cemetery. The plot is provided free, as is the grave opening and closing, and a simple grave marker. An honor guard and an American flag may also be provided. This saves significant money for the surviving spouse.

In addition to veterans, the following categories of decedents are also eligible for burial in a national cemetery: (1) a Commissioned Officer of the National Oceanic and Atmospheric Administration, (2) a Commissioned Officer of the Regular or Reserve Corps of the Public Health Service, (3) United States Merchant Mariners who served during WWII, (4) The un-remarried surviving spouse of an eligible decedent, even if that decedent is not buried in the national cemetery, (5) a minor child of an eligible decedent, subject to certain conditions.

Eligible veterans who are buried in a non-governmental cemetery may still qualify for a free grave marker. Make the request using VA form 40-1330.

Get information about national cemeteries from the National Cemetery Administration, part of the Department of Veterans Affairs. The website is www.cem.va.gov.

Cremation Issues

Cremation is chosen by many people. They have a variety of reasons, including the desire to save money. Cremation can cost as little as $800 with the right arrangements. Several cremation societies exist, some for-profit and some non-profit. They take the place of the traditional funeral home by contracting for low cost and no-frills cremations.

Cremation does not require the purchase of a casket, and funeral directors are forbidden to say otherwise. A

container is required, but cardboard is often the most appropriate choice.

Strictly interpreted, Texas law requires the cremated remains to be buried in a cemetery or placed in a columbarium. "Columbarium" means a durable fireproof structure containing niches used to contain cremated remains. In practice, the "ashes" are often scattered (although no law specifically allows scattering, no law penalizes it either). A surviving spouse may retain the urn at home, or scatter the ashes privately in the countryside or in a body of water.

Cremation can be motivated by environmental concerns as well. Burial space is at a premium in many places. The body may also contain harmful toxins, especially if chemotherapy shortly preceded death. Cremation is a cleaner alternative than burial in those instances.

NOTIFICATIONS

Family

An obvious but important step is to notify the family. The surviving spouse may have children who are already on the scene, and they can be very helpful making phone calls to siblings, grandchildren, nieces and nephews and close friends. The family address book and the decedent's email address list is a necessity here.

Obituary

The funeral home will ask if an obituary is desired. *Obituaries are voluntary*. Some families feel that a public and lengthy obituary is a proper tribute to a loved one. Some families feel that an obituary would violate their privacy, or that it is too expensive. The obituary has no legal significance and is not an official notice of the death. A short obituary without a photo is adequate, unless more is desired by the family.

Terminating Power of Attorney

The Agent under the Decedent's Durable Power of Attorney should be informed immediately about the death. Acts performed under a Durable Power of Attorney are valid after the principal's death if the Agent did not have actual knowledge of the death and was acting in good faith. Such an action might contradict the surviving spouse's wishes, so impart that "actual knowledge" to the Agent quickly.

Ceremony

After notifying the family, the next call is often to the clergy. The family's religious beliefs are both intensely relied upon and challenged at the time of death. Religious traditions important to the decedent and surviving spouse may be honored by contacting the family's house of worship.

Conversely, it is important that religious beliefs which were not held by the decedent should not be imposed by an outsider or family member. If the decedent was

secular or an atheist, then a non-religious ceremony may be held if it comports with the decedent's wishes. If the decedent requested cremation but another family member's religious doctrines are opposed to cremation, those doctrines should not be imposed.

Social Security

The Social Security Administration recommends that, as soon after the death as possible, a family member:

- Promptly notify Social Security of the beneficiary's death by calling SSA toll-free at 1-800-772-1213. The funeral home may offer to make this call for you, and there is no harm in the initial call coming from them. But the surviving spouse should still call SSA soon thereafter to be sure that survivor's benefits are properly processed.
- Any funds received for the decedent for the month of death and later will be returned to Social Security. The bank will electronically return the funds.

Survivor's Benefit

If the survivor is already receiving SS benefits on their spouse's earnings record, then upon the initial phone call to SSA they will change the payments to survivor's benefits.

If the survivor is already receiving SS benefits – but on their own earnings record – then the survivor must apply for survivor's benefits. The initial phone call to SSA is often enough to get this started as well. For this step, SSA asks for a copy of the decedent's death

certificate. The survivor will get only one check, but it will be based on the larger earnings record.

The surviving spouse receives full benefits at 65 or older or reduced benefits as early as age 60. A disabled widow or widower can get benefits at ages 50-60. The survivor's benefit may be reduced if he/she also receives a pension from a job where Social Security taxes were not withheld (this impacts many retired government employees).

Office of Personnel Management

OPM handles the retirement and death benefits for all federal employees and retirees. Contact them to report the death of any person who was a federal retiree.

If the decedent received benefits through the OPM, they will ask for their full name, date of death, retirement claim number and Social Security number. They will start the process of activating survivor's benefits, and may mail claim forms to be completed and returned.

The surviving spouse is entitled to a monthly survivor's pension only if the decedent so provided upon retirement. The vast majority do so provide. A lump sum payment, covering the benefits earned from the first of the month through the date of death may also be payable to the surviving spouse.

Military Survivor Assistance Office

If the decedent was retired from the military and receiving a pension, the surviving family should call the

Survivor Assistance Office. Look on discharge papers (DD Form 214) and for the annual pension statement for military ID numbers and pension details.

Other Pension Administrators

The surviving spouse will have information on other pensions the decedent received. If he/she is not sure of the data, ask to see last year's 1040 tax return. A 1099 should be appended that identifies the company and gives account details for the decedent.

Life Insurance Companies

Each policy owned by the decedent must be located. The issuer should be contacted so the claim paperwork can be started. There is no need to wait for receipt of the death certificate; a phone call to the claims department will initiate the process. They will mail claim forms to the beneficiary. This way the survivor may receive the claim forms and the death certificates at about the same time.

The insurance company must pay the claim either 1) on receipt, or 2) not later than two months after due proof of death and the right of the claimant to the proceeds. The Texas Department of Insurance has imposed additional time constraints: a company must acknowledge the claim and start investigating it within 15 days of receiving written notice of the claim. Once the company has all necessary information, it has another 15 days to notify the claimant in writing if it will accept or reject the claim. If a company cannot meet these deadlines, it must send a notice explaining why it

needs more time. The company then has 45 days to either approve or deny the claim. If a company rejects the claim, it must explain why. If the company agrees to pay the claim, it must send payment within five business days.

The survivor should also review credit card agreements, loan documents, and mortgages regarding credit life insurance. The decedent may have paid premiums so that upon death, a specific debt would be paid by credit life insurance.

Tax Appraisal District

If a homeowner was receiving the 65-plus exemption and died, leaving a surviving spouse under age 65, the surviving spouse can continue the exemption so long as the survivor is 55 or older. The younger spouse must also become owner of the house after the death (usually the house is community property, so the surviving spouse already owns ½ and gets the other ½ via probate or another legal process), and must reside in the home. The survivor must apply with the local appraisal district to continue the exemption. Some districts find out about the death and send a letter along with an application for exemption, and some do not reach out. If that is the case, the survivor should contact the appraisal district to obtain the application, fill it out, and submit it as soon as possible.

ASSETS AND ACCOUNTS

Many assets pass to survivors through non-testamentary designations. This might include a Living Trust or may include bank account arrangements like pay-on-death or right of survivorship.

If the survivor knows that they are on an account with the person who died, they can ask the bank (or the broker) for a copy of the account signature card. It is actually a contract, and will show whether the survivor is entitled to become owner of the account due to the death. If so, give a death certificate to the financial institution and they should release the funds.

Brokerage Accounts and Dividend Reinvestment Plans

When an account is held with an out-of-state institution (as are most Dividend Reinvestment Plans) the institution's internal paperwork is vital. It must clearly indicate a right of survivorship or a pay-on-death designation; if it does not, the institution is likely to demand an Executor be appointed in court.

Automobiles

Texas makes it easy to put a car title into right of survivorship. This is evidenced by a separate Right of Survivorship agreement on record with the Department of Transportation or, for titles issued after about 2002, is actually pre-printed onto the title. Activation is not automatic. The title must be signed by both spouses

before it has effect. For spouses, both need to sign the agreement portion of the title so title can later be transferred to the survivor by presentation of the title and death certificate to the local tax assessor-collector's office.

If the title lists both names but there is no right of survivorship, the tax assessor-collector will ask for Letters Testamentary, or an Order Admitting Will to Probate as Muniment of Title, or an Affidavit of Heirship to a Motor Vehicle.

Community Property Survivorship

Probate of a Community Property Survivorship Agreement (CPSA) is not necessary. Current law provides that the agreement is effective to pass title to the community property without any further action. However, the law does provide a method for "proving" the validity of the agreement in a dispute: the surviving spouse may apply to the courts for an Order establishing that the agreement is valid and meets the requirements of the law. This requires the survivor to produce the original agreement in court – but it is on record with the County Clerk, so a certified copy will suffice if the original is lost.

The survivor may sell any community property which is obtained via survivorship, but must wait six months after the date of decedent's death. The purchaser is assured good title if the CPSA was on record with the County Clerk.

In a very few instances, stubborn and backwards title companies shy away from approving a CPSA (even though they are approved in the Texas Constitution and are authorized in the Texas Estates Code). When that happens, the survivor has the option of either 1) insisting that the law be followed by obtaining a court order forcing the title company to accept the CPSA, or 2) cave in to the title company's position, generally submitting an Affidavit of Heirship to satisfy their underwriter.

Checks Payable to Decedent

If dividend checks or other payments made out to the decedent arrive in the mail, the surviving spouse has two options:

- Return the payment, requesting that a new check be issued to the "Estate of Decedent"; or,
- Since money in hand is hard to turn away, and if the surviving spouse is the sole heir, deposit the payment to an account that bears the decedent's name. Since the decedent is not available to endorse the check, the best course is to endorse it as "deposit only to account #___". Banks will almost always receive funds, even if hesitant to pay or to release them.

IRA Funds

The question has never been "will the IRS get a chunk" of a decedent's IRA; rather, it is "*when* will the IRS get a chunk?" The combination of income tax and estate tax on a large IRA can be devastating. If the surviving

spouse is the IRA beneficiary, they can rollover the IRA into their own IRA, deferring income tax. The survivor can also defer estate tax using the Unlimited Marital Deduction. This does not solve the tax issue; it just delays it.

The surviving spouse must contact the IRA trustee, probably a bank or a brokerage. They will need a copy of the death certificate. The trustee will process the IRA rollover in-house.

The IRA funds must be withdrawn, and income taxes paid on the withdrawal, under these rules:

- For a surviving spouse – withdrawals must be made based on the surviving spouse's statistical life expectancy;
- For non-spouses – withdrawals must be made based on the remaining statistical life expectancy of the designated beneficiary as of the year after the IRA owner's death; and,
- If there was no designated beneficiary – withdrawals must be based on the IRA owner's remaining statistical life expectancy as the IRS would have shown it in the year of their death.

Trust Assets

With a Living Trust, it is likely that the surviving spouse will be the Successor Trustee. This minimizes the procedures that are required, as there will not be a change of ownership. The Living Trust may simply continue for the surviving grantor's benefit.

If the survivor is not named as the successor Trustee, then authority for management of the assets will vest in the person who is named as successor trustee. That successor will need the original trust agreement and a certificate of death in order to access the various trust assets.

If the Living Trust contains Shelter Trust provisions (to utilize fully the estate tax exemption amount of the first to die) then the Trustee will have to re-title appropriate assets to fund the Shelter Trust. While the trust agreement should contain clear instructions to carry out the funding, you may want to call upon your Attorney to assist with the process. If it is the same attorney who drew up the trust, they will know and be able to advise you in carrying out the intent.

Homestead Occupancy

Texas homestead laws have a large and varied impact on homeowners. One very important right, but one that is often overlooked, is the surviving spouse's right to occupy and use the homestead.

The surviving spouse's homestead occupancy right continues after the other spouse dies. The surviving spouse always has the right to continue to occupy the homestead for life or until abandonment. Even if the decedent's Will gives their community property half of the house to someone else (maybe one of the children), that new half owner cannot exercise any dominion over the house.

Due in part to the strength of the surviving spouse's rights, the survivor also has legal responsibilities. One of them is to pay the property taxes in full and in a timely manner. As far back as the 1920's our courts ruled that "It is certainly according to equity and good conscience to require the survivor to pay current taxes…"[79].

Additionally, Texas law requires the surviving spouse to keep the property in good repair and to pay the interest portion of any mortgage that may exist. The trust or its beneficiaries must, by law, pay the major portion of any mortgage and pay for insurance on the property.

Occupancy of a home an easy concept. But what about the idea of "using" the house? Is the survivor "using" the house if they move to some other location and rent the house to someone else?

That issue was addressed in a 1976 case handled by the Texas Court of Appeals in Waco[80]. In it, the father died leaving his land and home to his children, and the wife had the legal right to "occupy and use" the premises.

---

[79]Sargeant v. Sargeant, 15 S.W.2d 589 (Tex. Commission of Appeals, Section A, 1929).

[80]Gonzalez v. Guarjardo de Gonzalez, 541 S.W.2d 865 (Tex.App. – Waco 1976).

She moved out due to poor health, and rented the home to her brother.

The Court applied the legal rule that "a temporary renting of the homestead will not terminate its homestead character if no new homestead has been acquired". The wife had moved out involuntarily due to poor health. She claimed that she wanted to return to the home, and she did not claim any other property as her homestead. The Court decided that she was still "using" the home under these conditions, and denied the children's claim.

Homestead occupancy and use rights can be waived in a Premarital Agreement. This may be something important for anyone pondering a second marriage.

Cleaning Out an Apartment

If a person who lives in rented quarters dies and an Executor is appointed by the court, the Executor is responsible for cleaning out the apartment. Speed may be necessary so that rental payments are not prolonged.

If, however, the estate is small and it is unlikely that probate will be necessary, then pre-planning by the renter can create a clear line of authority. Texas law allows the renter to give the landlord the name, address, and telephone number of a person to contact in the event of the renter's death. At the same time, the renter can sign a document authorizing the landlord to: 1) give the contact person access to the apartment, 2) allow the contact person to remove personal possessions, and 3)

allow the contact person to claim refund of the security deposit.

The same law allows a landlord to put all the renter's personal items into storage (and to deduct storage costs from the security deposit). When the contact person makes a request for possession of the deceased renter's personal items, the landlord is legally required to turn them over to the contact person.

The contact person needs to act promptly to claim the personal items because the landlord may legally dispose of the possessions if: 1) the landlord mailed the contact person (by certified mail, return receipt requested) a written request that the property be removed, 2) the property was not removed within 30 days of the postmark date, and 3) no one else contacted the landlord to claim the property.

What does it mean to "dispose" of the property? The landlord does not have to account for it in any way, even if it is still in storage, or if it has been thrown out, destroyed, or even if it has "disappeared" – which covers a lot of ground. Can the landlord just keep it, claiming it has "disappeared"? The law says the landlord has "no responsibility" for the property if the renter had been provided with a copy of the law.

On the other hand, if the renter does designate a contact person as the law allows, and the renter provides a copy of the law to the landlord, then the landlord is liable to the renter's estate for any violation of the law.

However, the law allows the lease agreement to contain an entirely different procedure for removing, storing, or disposing of property in the apartment of a deceased renter. Thus, before you go through preparing the notice and obtaining a copy of the law, carefully read your lease agreement. If you are not sure how to interpret the lease, visit with an Attorney to be sure your rights are protected.

REVIEW OF LEGAL DOCUMENTS

The survivor should gather the original legal documents of the decedent and other vital information. This may include, among other things:

	Last Will and Testament
	Codicil to any Will
	Body Bequeathal Contract
	Pre-need Funeral contract and burial instructions
	Cremation Society membership
	Family address & phone numbers
	Social Security number
	Pension documents for any survivorship payments
	Memorandum or list regarding the distribution of personal effects
	Living Trust Agreement
	Amendments to Living Trust
	Premarital Agreement

	Postnuptial Partition Agreement
	Cohabitation Agreement
	Conversions to Community Property under Family Code §4.102
	Community Property Survivorship Agreement
	Last year’s 1040 and identity of tax preparer
	Stocks, bonds
	List of bank deposits
	Credit cards and most recent statements
	Automatic drafts against bank accounts (for insurance premiums, etc.)
	Utilities (internet, telephone, electricity)
	Family Limited Partnership Agreement
	Military discharge papers (DD Form 214)
	Pension Survivorship Rights
	Life Insurance Policies
	Irrevocable Life Insurance Trust
	Health Insurance Policies
	Auto Title
	Deeds to Real Property
	Real estate appraisal from the local tax appraisal district
	Residential Leases
	Mortgages/Liens against Real Property
	Home equity loan or reverse mortgage papers
	Notes Receivable and Payable
	Judgments of Record

	Active Litigation files
	Buy-Sell Agreement
	Partnership Agreement
	Computer passwords and passwords to online services
	List of annuities
	Limited Liability Companies
	List of subscriptions (newspaper, magazines)

Secure the Computer & the Phone

The decedent may have left a computer, a tablet and a smartphone. The surviving spouse may not be familiar with either their operation or how to retrieve the information stored. Vital financial data may be stored in programs like Quicken™ or at online banking and brokerage sites.

Is a family tree recorded on the hard drive? It may help determine the identity of the heirs. Is there a computer address book, with phone numbers and email information? Are there emails to return? Are years of memories in the form of digital photos, digital videos and written documents stored on the hard drive or in the cloud?

People should take time to create a master password list to their computer files. Without passwords, the Executor may not be able to access the computer at all, and certainly will not be able to access online bank accounts, online brokerage accounts, email, cloud storage of photographs, and cell phone records. Create

a master password list so that data remains accessible after death.

If the surviving spouse in not computer literate, he/she may need to find someone to help close out any subscription agreements the decedent has entered. Does the survivor need or want to continue the decedent's Internet access agreement? Is there a second phone line or a cable modem that should be closed? Do Netflix, iCloud, Spotify or any other subscription services need to be terminated?

It may be wise to wipe the computer hard drive before it is donated to charity, given to a family member, or recycled.

Review the Survivor's Documents

The survivor should review their own planning documents. The decedent may have been the survivor's only named Agent in a Durable Power of Attorney or a Medical Power of Attorney. If so, the survivor must visit their attorney and choose a new and trusted representative.

The survivor should review their Will to reflect any new dispositive instructions. Perhaps the decedent had a different attitude about a particular heir, and the survivor desires to drop that heir (as the decedent can no longer find offense in the act). Perhaps the decedent was named as the survivor's sole Executor. Again, the survivor should meet with their Attorney to quickly select a new Executor and sign an updated Will.

The survivor should also reconsider any "right of survivorship" arrangements. All the rights of survivorship between the decedent and the survivor will have performed their function, leaving the survivor as sole owner of various assets. The survivor can, if they wish, now add any intended heir to various assets to enable non-testamentary transfers upon the survivor's death. Pay attention to the fact that non-testamentary transfers take priority over any contradictory statements in the survivor's Will; thus, an effort should be made avoid contradictions.

Certain legal arrangements may have been rendered irrevocable upon the decedent's death. Sometimes revocable grantor trusts become irrevocable on the death of a Grantor (by agreement of the parties). These arrangements must be reviewed and understood by the survivor.

Though a death has occurred and the survivor's life will forever be different, the sun continues to rise and to set. Eventually the survivor will regain equilibrium. It is then time to begin a new chapter, cherishing the past while looking to the future. Part of that is being certain that your own plans are in order and that the people who will outlive you will have as easy a time, legally, as you can possibly arrange.

PART 14: Upon Death - Probating an Estate

PROBATE

What is Probate? When is it necessary? What can be done to reduce the chances of needing probate? Why does it even exist?

Probate is the process of proving that a Will is valid, and handling any business left untended by the decedent. Generally, probate involves an Executor who must gain control over the estate, pay the debts, pay the taxes, and distribute the remaining assets to the proper heirs. Probate is rarely the nightmare experience it is rumored to be.

The term probate is also used to describe the procedures used when a person dies without having a Will. Typically, the probate procedures for an intestate estate (no Will) are more complex than those in which there is a Will. Without the evidence provided in your Will, probate may involve the additional complexity of a "proceeding to determine heirship".

The Texas Estates Code requires that most types of probate must be started within four years after someone dies. After that, the courts will not approve an

application for probate that seeks to issue letters testamentary to an Executor.

Ownership of assets passes instantly to the heirs when a person dies. The trouble is that neither the public, nor the bank, nor the broker nor the person buying the house knows the identity of those heirs. Evidence is needed to identify the heirs. Probate provides that evidence by establishing through the courts the validity of the Will or by determining through the courts the identity of the heirs when there is no Will.

Is Probate needed?

When does a Will need to be probated, and when can you skip the whole process? The answer depends on what assets and debts exist, and how assets are legally titled. For instance, if the person who died had no debts and owned only a checking account and a Certificate of Deposit that were both held jointly, with Rights of Survivorship then probate is probably not necessary. The surviving account holder can simply claim ownership by presenting a death certificate at the institution where the account or the CD is held.

On the other hand, if the person who died was sole owner of a home, was sole owner of a bank account or stock certificates – which is not too unusual a scenario – then probate is probably necessary. No one has automatic ownership of those items, so probate is used to establish the legal identity of the new owner(s) and to transfer title.

Thus, the need for probate depends primarily on these factors:

- The estate's complexity in terms of debt and obligations of the decedent;
- What the estate owns. Assets that rely heavily on paperwork to show ownership—like stocks, bonds, real estate, and bank accounts—tend to force an estate into probate. Why? Because the people who process the paperwork are protected from certain liabilities if they deal with a duly appointed Executor;
- The heirs' desire for clear and unquestionable title to assets; and,
- Efforts at avoiding probate by preplanning.

A person can arrange their assets to avoid probate. Before you engage an attorney, review the preplanning efforts of the Decedent. Many preplanning techniques have already been covered in this book. Look for:

- A LIVING TRUST agreement that has been fully funded;
- Non-testamentary designations like "PAY-ON-DEATH" designations and "RIGHT OF SURVIVORSHIP" arrangements;
- A COMMUNITY PROPERTY SURVIVORSHIP AGREEMENT (CPSA) if the Decedent was married.

THE EXECUTOR

When someone dies, there is often unfinished business. Final bills must be paid, taxes must be settled, and assets must be distributed. That is the job of the Executor, who may also be referred to as the estate's Personal Representative.

Becoming an Executor

Even though the Will identifies an Executor, that nominated person is not legally Executor until approved by the court. Prior to being officially appointed, think of that person as the "pending Executor".

The Executor's official role begins with selection of an attorney. It is not legal for a pending Executor to act without a lawyer, as that would be practicing law without a license (the Executor is not representing themselves; rather, the Executor is representing the estate and as such cannot act pro se). The guidance of an attorney to assist with the probate system is vital.

The pending Executor will make an appointment to meet with the attorney. The attorney will help the pending Executor select an appropriate probate procedure. This includes Dependent Probate (where there is no Will, or the Will requires the highest level of supervision), Independent Probate (where the Will appoints an Executor to act without court supervision), and Muniment of Title (where the Will is used to transfer ownership without an Executor's appointment).

The attorney will write the Application for Probate and submit it to the court's clerk along with the original Will. Soon after, the Attorney will receive from the court a date for the probate hearing. The Attorney will accompany the pending Executor before the probate Judge. If all goes well (that is, there is no contest and the Will is not faulty) the Judge will sign a court order admitting the Will to probate, officially recognizing the Will's validity. Since the Application for Probate included a request for appointment of the pending Executor, the court order will officially activate the Executor's powers. The clerk will issue Letters Testamentary. Depending on which probate procedure was selected, other legal steps may be required by law as well. The attorney will know these steps and guide the Executor.

The Letters Testamentary are used by the Executor as credentials. If a bank or broker holds some of the estate's funds, they will allow the Executor to access to the funds upon presenting a copy of the death certificate and a Letter Testamentary. The Executor uses the funds to pay debts and taxes of the estate, and when all debts are paid, distributes the remaining assets to the heirs named in the Will.

Executor must not be Disqualified

The law requires that the nominated Executor prove to the court that they are not "disqualified" from being appointed as Executor. In Texas, Estates Code section 304.003 says that there are five reasons a nominee may be disqualified:

1. If the nominee is incapacitated;
2. If the nominee is a convicted felon;
3. If the nominee is a corporation which is not authorized to act as a fiduciary;
4. If the nominee is found by the court to be unsuitable; or,
5. If the nominee resides outside of Texas and has not signed and filed an appointed a resident Agent to accept service of process in any legal proceeding related to the estate.

Out of State Executors

Texas law favors using a Texas resident as Executor. However, it is perfectly legal to have an Executor who is not a Texas resident. The pending Executor must sign a document appointing a resident Agent – someone in Texas who can accept delivery of legal documents on the Executor's behalf. The document must be filed and approved by the court. Then the non-resident is treated exactly like a resident while acting as Executor.

Deciding Not to Serve

When the Will names an Executor, that person can decline to accept the position with all its tasks and liabilities. If so, the first source you must look to is the Will. Most attorney-drafted Wills anticipate that the first named Executor might not serve, and thus nominate one or more an alternate Executors.

If so, that nominated alternate is the person who will serve if the first choice steps aside. If that alternate Executor wants to serve, the process is straightforward.

The attorney who is aiding with probate of the Will would draft a sworn Waiver of Appointment for the first choice to sign (before a notary). It would be filed with the probate clerk along with the Will and Application for Probate, in which the alternate requests appointment as Executor.

Supposing that alternate does not want to serve, he or she must also sign a sworn Waiver of Appointment. Continue to progress through any other alternates named in the Will, until one of them either agrees to serve or they all waive appointment.

If everyone named in the Will waives appointment, then state law determines the process for appointing someone else. The Estates Code puts tighter restrictions on an applicant when the decedent did not name that person in the Will as a choice for Executor. Assuming that an applicant was not named in the Will, he would have to apply to be "Administrator" rather than "Executor”.

Co-Executors

When a Will names more than one Executor at the same time, they are called Co-Executors. It is legal for one of the Co-Executors acting alone to take care of most estate business. Routine matters like collecting funds from a bank account can be handled without unanimous action, without even a majority – unless the Will specifically States that all Co-Executors must act jointly and unanimously.

Even if the Will is silent on that point, any conveyance of real property requires all of the Co-Executors to act jointly and unanimously (a majority is not adequate). Only the probate Judge can override that requirement by ordering one of the Co-Executors to sell land acting alone.

Most Wills do not name Co-Executors. Instead, they name a solo Executor and then identify alternates to act if the initial Executor dies, resigns or becomes disabled. Having a solo Executor avoids what was described by Judge Grant of the Texas Court of Appeals as "a hydra-headed administration of the estate in which there is no guarantee that there will not be a duplication of effort, as well as each Executor being able to hire an attorney to be paid out of the estate which would result in double attorneys' fees".[81]

Naming Co-Executors can provide an opening for conflict, because Co-Executors are not bound by law to act unanimously.

For instance, what if funds are limited and one Co-Executor feels it is appropriate to pay off the MasterCard while the other one wants to use the money to pay off the Visa? They might argue over money and how it should be allocated. Both Co-Executors could

[81]Lesikar v. Rappeport, 33 S.W.3d 282, 321 (Tex.App. – Texarkana 2000).

even hire separate attorneys which would double the cost of administration.

If the Co-Executors are like-minded they can choose to coordinate all of their efforts. Conflict is not a given just because a Will nominates Co-Executors. When they get along and work together, Co-Executors share the burden and lighten each other's load. It depends on the character of the people and their relationship whether naming Co-Executors is a wise or an unwise tactic.

GUIDE TO BEING EXECUTOR

Offering a Will for Probate

A Will can be offered for probate by the nominated Executor or by any "interested party". When an interested party hires an attorney to file an application for probate of the Will, they are limited to asking the court for two things: 1) to accept the offered Will as the "last Will" of the decedent, and 2) to empower the nominated Executor to handle the estate's affairs. Hence, it is typically the nominated Executor who deals with the Attorney and not just an interested party.

Proving the Will's Authenticity

Consider the appointment of a personal representative from the Judge's perspective. For example:

> Into court walks John Smith, whom the Judge has never met. John has a document that appears to be Betty Smith's Will. The Judge must ask: Is this really

Betty's Will, or is it a fake? Is Betty really dead? Is my court the right place for these questions to be asked? Does the Will nominate John as Executor?

The law requires that all of these questions, and more, be answered. The authenticity of the Will must be established using one of these methods:

- A) The witnesses who saw Betty sign the Will can be located and brought to court. They can testify that the Will is really Betty's Will. However, witnesses cannot always be easily located because a Will might be many years old.
- B) If the actual witnesses cannot be located, anyone who knows Betty's handwriting well enough to identify her signature can be brought into court. They can testify that the Will appears to be Betty's. However, sometimes there are no such witnesses.
- C) If Betty's lawyer had the foresight, her Will should be "self-proven". This is an affidavit attached to the Will and signed by Betty and her witnesses at the time they signed the Will, or an integrated statement as part of the Will, as allowed by law. Under the Texas Estates Code, a Self-Proving Affidavit alone is adequate evidence for a Judge to admit the Will to probate. This technique is the most reliable and the least expensive.

Other facts must be entered into evidence. Some Probate Judges like the Executor to testify out loud, answering questions posed by your lawyer. Some Probate Judges want everything to be written down and sworn to before speaking with the Judge.

Once the Will is authenticated, the Judge must determine that the applicant is qualified to be Executor.

Will Contests

Legally, anyone has the right to contest a Will so long as the claim is legally justified. No one should jump into a Will contest without considering that the battle will be emotionally difficult, financially expensive, and time consuming. The person bringing the contest must hire and pay an attorney. Some attorneys accept contingency fees (where you do not pay unless they win), but this is most common in accident cases. In a Will contest, the person bringing the contest should expect to pay the attorney fees.

Sometimes people get angry when their inheritance expectations are not met. However, legal proceedings in a Will contest might last longer than the anger. Then the person bringing the contest would be stuck with a complex and expensive lawsuit that remains time consuming and burdensome even though the emotional motive has faded.

Will contests can also cause extensive family conflict. The emotional damage that will be inflicted in the Will contest may never heal. If an heir is considering starting a contest, they should factor in their emotional state. Remember that the wishes expressed by the decedent are the real issue. The decedent owned various items and had an undeniable legal right to give them to anyone – and so long as the Will accurately reflects those wishes it should be followed. But, if the Will is indeed

faulty (for any of the legal reasons set out below) then it may not be worthy of probate.

‖ *Burden of Proof*

Timing for a Will contest is critical. If a contest is filed *before* the Probate Judge's initial ruling to admit the Will to probate, then the person who is offering that Will (usually the nominated Executor) must prove it *is* valid. That proof may not be difficult to obtain, especially if the Will is "self-proven" as discussed earlier.

If a contest is filed *after* the initial ruling that the Will is valid, then the person filing the contest has the legal obligation to prove the Will *is not* valid. Proving invalidity is a task that is often more difficult that it first seems.

‖ *Grounds for a Contest*

A contestant must be able to prove some very specific facts before the court can invalidate a Will. The key issue is evidence, hard evidence. Suspicion, rumor and anger are not enough to stand up in court. Before filing a Will contest, the disgruntled party should look deeply to see if there is any hard proof of any of these things:

- Did the Testator lack testamentary capacity when making the Will? Did the Testator understand who was in the family, know what assets exist, and know to whom he/she wanted those assets to pass? Was the contestant present on the day the Will was signed? If not, how does the contestant know the answers to those questions?

- Does the Will meet all of Texas' legal requirements to be admitted to probate? Is it signed by the Testator, witnessed and dated? If it is handwritten, is it in the Testator's own hand writing? Is the Will genuine or a forgery?
- Was the Testator unduly influenced? Did someone force the Testator, through threats and coercion, to sign the Will? Was the contestant on the scene at the time the Will was signed, or are they just speculating about these things?
- Is the Will a fake or a forgery? How can the contestant prove that it is not authentic?

When there are two possible Wills – an "older" Will and a "newer" Will that may have replaced the older one – is it worth filing a contest to see if the older Will can win? This entirely depends on the circumstances. Even if the contestant manages to disprove the validity of the newer Will, the older Will is not necessarily restored. While the newer Will may not have been a valid Will, it may have been a valid revocation of the older Will (the standards for creating a new Will versus the standards for revoking an older Will are quite different). If the new Will is invalid but the old Will is revoked, you may end up with intestacy – the absence of any valid Will – requiring application of state law to determine the heirs' identities. The person filing the contest would receive only what the laws of descent and distribution provide. This may be less than expected, perhaps far less than the older Will would have allowed. If that happens, is the Will contest worth the trouble?

Always think long and hard before starting any type of Will contest.

Probating a Lost Will

It is always preferable that the original Will be offered for probate… the actual pieces of paper that the decedent and witnesses signed, not a facsimile or copy. When the original is filed with the court, the court requires that its validity be proved in the ordinary fashion discussed above.

What if the original Will cannot be located? Legally, we must presume that because the pieces of paper are lost the Will has been revoked. This is a "rebuttable presumption," one that can be overcome if there is proof to the contrary.

The Texas Court of Appeals summed it up by saying, "When a will is in the possession of the testator when last seen, failure to produce the will after the testator's death raises the presumption that the testator destroyed the will with the intention of revoking it, and the burden is cast on the proponent to prove the contrary"[82]. Other courts have ruled that the words "in the possession of the testator" will be broadly interpreted. For instance, when a Will was last known to be in the possession of the testator's lawyer the court treated it as though it was

[82] 735 S.W.2d 924, 927-28, Hibbler v. Knight (Tex.App. -Houston 1987, writ ref'd n.r.e.).

in the possession of the testator[83]. If it was simply in a place to which the testator should have had access, it is treated as though it was in their possession.

The presumption that a lost Will has been revoked can be overcome by contrary testimony. For instance, if the Will was last seen after the date of the testator's death then the person who saw it can testify that the fact it is lost is not because the testator destroyed it. Or if the testator was too ill to have destroyed the Will (was, for instance, in a nursing home or was unconscious since the last time anyone saw the Will) the court may agree that it was not revoked.

Evidence must also be submitted to prove the contents of the lost Will. In the best case scenario, a photocopy of the Will may be filed with the court as evidence of what was stated in the lost Will. If a copy cannot be found, it is possible for someone who read the Will to testify verbally about what the lost Will stated.

Additionally, the court needs to know the identities of the people who would inherit under the laws of intestacy if the Will had been revoked, and to have signed Waivers from them. Sometimes the Will and the intestacy laws would have yielded the same result, so the court does not have anyone to protect. But if the Will

[83] 480 S.W.2d 820, 821, Cable v. Estate of Cable (Tex.App.--Fort Worth 1972 no writ).

would have left everything to the Testator's sister while state intestacy law would have given everything to the Testator's son, then the court needs to consider son's legal rights.

Bond & Oath

Before taking office, an Executor must post bond unless the Last Will and Testament says no bond is necessary. The bond is an insurance policy guaranteeing honest action by the Executor. If the Will did not waive bond, then before letters testamentary can be issued, the Executor must visit with a bonding agency, obtain and pay for the bond, and return it for the Judge's approval.

After the bond issue is settled, the Executor must take an oath of office swearing to fulfill the duties and responsibilities of the role. Then the clerk issues official credentials, called Letters Testamentary.

Letters Testamentary are signed by a county clerk, bear the county's embossed seal, and identify the Executor. A Letter must be presented to the bank, to the broker and to anyone else who needs assurance that the person who has just walked in the door is, indeed, the legal Executor of this particular estate.

Notice to Heirs

It has never been a popular custom to hold a formal reading of the Will. The large family gathering to hear the Will is seen more often in the movies for its dramatic flair than it is seen in real life.

Still, all individuals, organizations and charities named in the Will who are going to get over $2,000 must be notified (unless that person has already received the entire devise before the date the Executor is required to send the notice). The Executor has three choices:

1. Send a notice by certified mail which includes a copy of the Will and the Order Admitting the Will to Probate; or
2. Send a notice by certified mail which describes the gift given in the Will, if it can be easily described; or,
3. Ask an heir to sign a Waiver of Notice.

After all the notices are sent, the Executor or Attorney must file a report informing the court that the notices have been provided in a timely fashion.

Notice to Creditors

Shortly after receiving Letters Testamentary, the Executor must notify the public of the appointment. This notice must be run in a local newspaper. It tells anyone who might care whom to contact regarding any claim against the estate.

Several other notices may be necessary. For instance, if the decedent owes any taxes to Texas (like sales taxes on a sole proprietorship business) then notice must be sent to the Texas Comptroller. If a mortgage exists, the lien holder should be notified. And general creditors can optionally be mailed a notice that gives then a limited amount of time to present their bill or be barred from future collection efforts.

Inventory of the Estate

Prior to 2012, both Independent and Dependent Administrations were required to file a public inventory of the assets of the estate within 90 days of the Executor's taking the oath of office. Currently, the Executor has a choice whether to file the Inventory or to file an Affidavit in Lieu of Inventory if certain conditions are met.

Filing an Inventory does not, under most circumstances, need to include a detailed list of the decedent's personal items. It does include a list of all the financial resources that pass by the terms of the Will. The inventory can be used by anyone with a claim against the estate to decide whether to pursue that claim, and is used by the IRS if any estate tax return is required.

The fact that the inventory is public is a motive for some people to use a Living Trust instead of a probated Will. The trust avoids probate and thus avoids the filing of a public inventory. Many public records are being posted on the internet, so a public inventory could become a source for scammers and identity thieves.

To address privacy concerns but to still be certain those with a right to know receive full information, Texas law says that when 1) there are no debts (except for secured debts like a mortgage), and 2) all beneficiaries named in the Will have been given a copy of the Inventory, then it is *not* necessary to file the Inventory with the court. Instead, the Executor can ask the Attorney to file an affidavit telling the court that the law has been followed.

Thus, the private information is released only to the estate's heirs, and not to the general public.

Either the Inventory itself, or the Affidavit in Lieu of Inventory, must be filed with the court no later than 90 days after the issuance of letters testamentary. Despite the deadline, most courts are lenient in granting extensions, but may charge a late fee if the 90 days have passed. Frequently in larger estates it takes more time to gather the data, and the accountant wants to be sure that the estate inventory closely matches the estate tax return. Since the tax return is not due until nine months after the date of death, the courts are fairly understanding of a request to extend the 90 days for accounting purposes.

Estate Tax Return

Probate is sometimes confused with preparation of a federal estate tax return. Probate is a state-based, local process. Needing probate does not automatically mean that you'll need to file a federal estate tax return with the IRS. On the other hand, when an estate is large enough that a federal estate tax**Error! Bookmark not defined.** return becomes necessary (in 2016, larger than $5.45 million) then it is highly likely the estate will also go through probate.

Handling Title to Real Estate

If the deed to the house is in the survivor's name only, then the survivor is already recognized as the sole owner. When it is time to sell it, there should be no trouble. However, if the house is in two names

(typically husband and wife) the surviving spouse will certainly have difficulty when it comes time to sell unless proper procedures are followed.

Why? The buyer expects that everyone who owns an interest in the house will sign their interest over upon the sale. If one owner dies (say it was the husband) and his name is on the deed, the buyers will want to know to whom he left his share and who has authority to sign for him. Those questions are answered if he left a Last Will, but the answers are only acceptable to the public when the Will has been probated.

There is four-year statute of limitations on probating a Will and having an Executor**Error! Bookmark not defined.** appointed. After four years, it is sometimes possible to probate the Will solely to show the change of ownership (using Muniment of Title). Otherwise, the heirs must be determined under the State's intestacy laws, which will likely delay the sale of the house.

Probate of the Will so that the Executor's powers are activated is only the first step. The Executor is responsible for fulfilling the terms of the Will and should sign an "Executor's Deed" to change title into the name of the heir specified in the Will. The Executor's Deed must be prepared by a skilled Attorney, and then recorded with the county clerk. Once done, the heir will be recognized as full owner of the house, with the right to continue to live there and the right to sell it when the time is right.

Distributing Stocks & Bonds

Many estates include stocks, bonds, and other securities that can only be traded or sold through official channels.

If a cache of stock certificates is found in the decedent's safe deposit box (or in a suitcase under the decedent's bed) the Executor has two choices on how to process them and two choices on how to distribute them. The processing choices are to either handle each stock separately or open a brokerage account in the name of the estate.

Handle each stock separately by contacting the transfer Agent who has been selected by each corporation to keep records of who owns their stock. The identity of the transfer Agent may be printed on the face of the stock certificate, and is most typically a large bank. Phone them for instructions, and they will likely say they need 1) a Letter Testamentary issued no longer than 60 days ago, 2) a death certificate, 3) the actual stock certificate, 4) a letter of instruction from the Executor, 5) an Affidavit as to the Domicile of the Decedent, and 6) various other papers to annoy and confuse you.

They will likely also require that the Executor's signature be affirmed with a "medallion guarantee" – a method of confirming your identity by having a commercial bank verify your identity. Sometimes finding a commercial bank to apply the medallion guarantee can be frustrating. They will not accept notarization, and they are in control, so you must jump through each hoop they put in front of you.

Repeat all of those steps for each different stock. The quantity of paperwork and the amount of legwork involved can be quite extensive.

The other option is to open a brokerage account in the name of the estate, and give all the stock certificates to the broker. There is paperwork to open the account, and the broker will ask for a letter testamentary and the death certificate. All of the stocks will be placed into this new account (and the certificates will be replaced by a monthly or quarterly statement from the broker listing the various items held in the account). The Executor not be dealing directly with transfer Agents and will not need any medallion guarantees, so this method cuts down the quantity of paperwork and the amount of legwork tremendously.

Now that the securities are processed and the Executor has control over them, the Executor must follow the terms of the Will. If the decedent has debts that must be paid, the securities are a source of funds (but should probably be used to pay the debts only if there is not enough money in the estate bank accounts).

When the debts have been eliminated, it is time to distribute the remaining estate as called for in the Will. The Executor has two methods available: they can instruct the broker to either (1) sell the securities, place the proceeds into an account, and send a check to each devisee, or (2) open an account for each devisee with their stock.

The first method is more work for you, the second method is more work for the broker. The first method

eliminates the investments the decedent selected in order to distribute cash, the second method preserves the investments, which allows each heir to decide personally whether to sell or keep the investments. Each heir's needs are different, and it is often appropriate to allow them to make their own decisions whether to retain or to liquidate the various investments.

Valueless Items

What does the Executor do when they have to handle an asset that has only minor value, or is even a nuisance? Sometimes undesirable responsibilities are thrust upon us, like an inexpensive, undeveloped parcel of land burdened by property taxes, membership dues, and/or maintenance fees.

The Executor is empowered to make an attempt to liquidate a bad investment. However, the Executor does not have unlimited discretion, as the terms of the Will must be followed. If it says that the family's adult children inherit everything, they inherit both the good and the bad investments. If the land cannot be sold so that the proceeds can be split according to the Will, then the Executor may distribute ownership to all the heirs with an Executor's deed. That removes ownership from the estate and makes the heirs into partners who co-own the land with shared responsibility for paying its expenses.

Alternatively, the Executor may be able to give away the property. First, get written permission from each of the heirs. Then contact the local school district,

volunteer fire department, The Nature Conservancy, a local charity or one of the neighboring landowners. Someone may be happy to take the land if it serves their own interests to do so.

Executor's Fee

There are two ideas running through the law about Executor's fees. First, in Texas, the fee statute provides a very vague set of rules to determine what fees are appropriate. Second, all states allow their statutory schemes to be disregarded if the Will itself sets different rules for handling the fees.

Under the Texas statutory scheme, the Executor is "entitled to receive a commission of five per cent". That raises the question, "per cent of what?" Calculating the Executor's fee under the statutory scheme can be very involved.

For instance, the statutory scheme forbids any fee "for receiving funds … which were on hand or were held … in a financial institution or a brokerage firm". That means that the Executor cannot legally charge anything for just going to the bank or brokerage to get and distribute the estate's money. On the other hand, the Executor can charge 5% for selling real estate, for collecting debts owed to the estate and for paying debts owed by the estate.

The statutory scheme can be easily changed by setting different rules in the Will.

In one Texas case[84], the Will said the Executor should be paid a "reasonable fee". The Executor sold real property belonging to the estate for about $27.5 million, and took a fee of about $2.8 million. One heir sued the Executor, claiming that fee (about 10%) was too high. The court decided that the terms of the Will overrode the statutory scheme; that the 10% fee was allowable because it was within the Will's "reasonable fee" limit.

Is it a good idea to list the Executor as an heir, to be sure they get paid? That depends. If the Executor is someone who would ordinarily be included as an heir, then that inheritance is adequate; no additional fee need be allowed unless the Testator really wants to give additional funds.

On the other hand, if the Executor is someone who would not ordinarily be include as an heir, the Testator might reduce the Executor's future income taxes by deciding to give an inheritance in lieu of a fee. One snag: if that person declines to act as Executor, they may get the inheritance without doing any work. The alternate Executor may do all the work without pay.

As a consequence, the best approach is to either 1) say in the Will that there is to be no fee at all, or 2) say in the Will that there is to be a specific percentage of the gross estate as a fee or a specific dollar amount as a fee.

---

[84] Lee v. Lee, 47 S.W.3d 767 (Tex.App. – Houston 2001).

Doing so ensures that the Executor or the Alternate (whoever actually serves) will be the one who gets paid, and that calculating the fee will be much easier than it would be under the statutory scheme.

Finding "Missing" Heirs

Part of the Executor's job is to locate the devisees named in the Will so the items identified in the Will can distributed to them. What if one of the heirs is missing?

If "missing" means this heir is simply hard to get in touch with, or will not reply, or that the family knows vaguely the person is "somewhere in Alaska" but they are just not sure where… then the Executor needs to redouble efforts to make contact. The Executor should consider hiring an investigator to track down the heir, or use the internet to do a search.

Also check to see if there is anyone who is already authorized to represent the heir. Is there an Agent who has been appointed in a Durable Power of Attorney? Was there ever any court action to appoint a Guardian for this person before contact was lost? If the answer is yes to either question, that representative can work with the Executor.

If "missing" means this heir has truly disappeared and the property is in danger of being injured, lost, or wasted then the Executor proceeds by bringing court action to create a Receivership. In this context, "waste" could include losing the opportunity to make a profit from the sale of a piece of land.

If “missing” means that the heir has been gone for over seven years and there is no indication during that time that person is still alive, the courts can presume that person has died. In that case, the Executor can inquire whether the missing person left a Will naming heirs to that share of the properties, or whether state laws on intestacy determine who now owns that share.

Types of Probate

The term “probate” in Texas covers many different types of procedures ranging from extremely complex to simple:

- Dependent Administration: The most complex probate procedure. It may be necessary when a person dies without having a Will, or when a person fails to simplify the process through instructions in their Will. In this method, the estate’s manager is called an “Administrator,” receives “Letters of Administration” as credentials, and must get prior court approval for most actions. This often operates hand-in-hand with a Proceeding to Determine Heirship.
- Independent Administration: A simpler probate process than Dependent Administration. It is called *independent* because the Executor may act in most instances without prior court approval by following the instructions in the Will. The credentials an Executor receives from the court are called Letters Testamentary.

- Muniment of Title: Available when there are no debts to be paid, other than secured debts. A court order acts as evidence that ownership has passed through the terms of the Will. In this procedure, no Executor is appointed and no Letters Testamentary are issued.
- Small Estate Affidavit: May be filed if the estate is smaller than $50,000, and has no real estate other than a homestead (which does not count toward the $50k limit). No Executor is appointed and no Letters Testamentary are issued. This process also requires approval by a Judge.
- Affidavit of Heirship: May be filed with the county clerk. This process has the advantage of being inexpensive, and the disadvantage of being unreliable. No court approval is issued, no Letters Testamentary are issued, and the Affidavit does not have to be – though generally is - accepted as proof of title.

Dependent Probate

Dependent probate is supervised by the court in nearly every way from the date of the representative's appointment until the estate's business is concluded. If it is time to pay a debt of the estate, to sell an asset of the estate, or to distribute property to the heirs, the representative must first get approval from the Judge.

The representative is called a Dependent Executor if selected by the decedent in the Will, and called a Dependent Administrator if selected by the Judge in cases where there is no Will, or if the Will is faulty.

An Administrator is most often required to post bond and is subject to supervision of all activities by the court. That supervision can be a big factor in how fast the estate can be handled and how much it will cost.

There is one way, under these circumstances, to avoid court supervision and to eliminate the bond. Under Texas law it is legal for 100% of the distributees to agree to an unsupervised administration. The law requires all of the distributees be officially served legal notice of the application for independent administration; it also allows distributees to waive notice or to appear in court. The court must be satisfied that it is hearing from all the heirs, so the proponents must offer clear evidence that everyone has participated.

Once the facts are established, the heirs may unanimously select a person to serve as independent administrator. Any individual heir who disagrees can veto the whole process. But if no heir dissents, the court will appoint the person they have selected (unless the court finds that to do so would not be in the best interest of the estate).

Muniment of Title

Probate of the Last Will and Testament as a Muniment of Title may sound intimidating. But, substitute the word “evidence” for “Muniment” and the meaning becomes clear: through proper legal action taken in court, the Will itself acts as evidence of the changes in ownership.

Muniment of Title is less complex and less expensive than either Dependent or Independent Probate. However, it is not available in all situations. It can only be used if the estate owes no debts (other than, perhaps, a mortgage) and if there aren't any other reasons for an Executor's appointment.

Sometimes the pattern of heirship set out in the Will makes Muniment of Title impractical. If the Will names several heirs or if the Will contains any type of trust, using the Muniment process does not answer all the questions raised by the Will. Business dealings like rental property, partnership, or having creditors call for appointment of an Executor instead of a Muniment. However, if the Will leaves everything to just one person, Muniment may be appropriate.

Similar to the process for appointing an Executor, in Muniment of Title the Attorney prepares an application requesting a court hearing. The Judge hears the evidence, reviews the Will, and if satisfied that all is proper, the Judge signs an Order approving the Will as Muniment of Title.

That Order itself establishes as legal fact that the Will is authentic, instructs the clerk to record the Will in the county records, and instructs anyone with assets belonging to the estate to turn them over to the heirs named in the Will without further legal complications. This allows the heirs themselves to gather and take possession of the estate's assets.

No Executor is appointed in a Muniment of Title. As such, Letters Testamentary are not issued. No oath is

needed, no bond is posted, no inventory is prepared, and no court approval for future action is necessary. Within 181 days of the Order's issuance a report should be made to the court detailing how the Will's instructions have been followed (although the Judge may agree to waive the report).

Beyond the Statute of Limitations

When the heirs named in a Will do not bring the Will to court for probate within the four-year statute of limitations, the law says that they have missed their opportunity. It is as though the Will never existed. As a consequence, the people named in the Will are no longer entitled to receive the assets of the estate; instead, the laws of intestacy determine who gets the assets. Failure to probate can have very large financial consequences.

Muniment of Title is the only possible way around the four-year statute of limitations. Before this process can be used, these conditions must be met:

First:

The person offering the Will must not be "in default" which means that they cannot have purposefully waited beyond the four-year limit. Default means failure to use reasonable diligence. It may involve the amount of time that has passed, lack of knowledge about the law or discovery of new information.

For instance, in the case of Kamoos v Woodward[85], the Will was not offered for probate by the surviving wife until five years after her husband died. She had the Will in her possession the whole time, but the only assets that she knew about were the bank account and the home. During the fifth year, she was informed that her husband had some mineral rights, and she promptly filed the Will for probate. The court found that she was not in default and allowed the Will to be probated as a Muniment of Title.

Second:

Section 258.051 of the Texas Estates Code requires that each of the intestate heirs receive notice (or waive notice) that the Will is being offered for late probate. The heirs identified by the laws of intestacy must agree that they do not object to the Will being used. Why? If the Will is accepted by the court, then its wording determines who gets the assets. The intestacy laws no longer decide who is entitled to the assets. Often the Will specifies different heirs than the intestacy laws identify. Before the court applies this exception to the statute of limitations and changes who might be entitled to assets, it wants to clear the process with all interested parties. The Judge must balance the opposing rights of the heirs at law versus the devisee(s) under the Will to decide who will be treated as owner.

[85] Kamoos v. Woodward, 570 S.W.2d 6 (Tex.Civ.App. —San Antonio 1978)

Confusion for Stock Transfer?

If the estate has any stocks, a non-Texas transfer Agent may insist on Letters Testamentary. Muniment of Title does not provide such Letters, a fact that confuses the out-of-state transfer Agent and can result in delays. Under Texas law, the Muniment order is sufficient to transfer stock – but it is not what the out-of-state transfer Agent expects. The heir might either argue the point, or might decide that it is better to obtain Letters Testamentary by offering the Will for Independent Probate to avoid this argument with out-of-state transfer Agents.

Small Estate Affidavit

A "Small Estate Affidavit" may be used when someone with a modest estate dies without having made a Will. It is limited to situations where 1) the estate is valued under $50,000 other than a homestead, and 2) the estate owns no real estate other than a homestead. Since no Will exists, the state laws of descent and distribution determine the identity of the heirs. Also, state law requires that at least 30 days pass since the date of death before the Affidavit can be filed in court.

This process is available for transferring homestead ownership but cannot be used to transfer title to any non-homestead real estate. If other land is involved, then a Dependent Probate may be required. Also, the homestead may only be passed to the surviving spouse or minor children. If there are other heirs (like adult children) then a Small Estate Affidavit may not transfer

title to the homestead. (Why? Because the legislature said that title could only pass to someone entitled to the family exemption, and that does not include adult children. This is a new restriction as of 2015, and is not one that makes much sense.)

The attorney will write the Small Estate Affidavit to include a list of all of the heirs-at-law, with their names and addresses. A list of all the assets and debts of the deceased must also be included. All the heirs must join together to sign the Small Estate Affidavit, so this process is practical only if the family is cooperative.

The Small Estate Affidavit must also be signed by at least two people who knew the decedent but who do not receive anything from the estate. All the signatures must be notarized.

After filing the Small Estate Affidavit with the probate clerk, it is assigned a case number. Since this is an abbreviated procedure, no notice of the filing need be given by the heirs or by the court. The Attorney will present the Small Estate Affidavit to the Judge, but no formal hearing is held. No witnesses are needed beyond those who have signed the Small Estate Affidavit, and no testimony is taken in court.

After it receives the Judge's approval, the Small Estate Affidavit is recorded in the probate clerk's records and the heirs get certified copies. If a homestead is included, the approved Small Estate Affidavit must also be filed in the county's deed records.

The Small Estate Affidavit and approving Order identify which assets the heirs are entitled to receive and to authorize banks, transfer Agents, and other persons who hold assets of the estate to deliver those assets to the heirs.

Affidavit of Heirship

Affidavit of Heirship is formally called Non-Judicial Affidavit of Facts Concerning the Identity of Heirs. It is the simplest and least expensive probate procedure. It is also the least reliable since a probate Judge never gives approval. The heirs-at-law will need an Attorney to assist with preparation of the Affidavit of Heirship.

If the estate is mostly personal items or paid-for land, and if the entire family is agreeable so there is little chance of a contest, then an Affidavit of Heirship might succeed. On the other hand, if there are stocks or bank accounts, an Affidavit of Heirship may not be acceptable to either the bank or the broker.

The Affidavit of Heirship is a sworn statement about the life history of the deceased person. If a Will exists, it may be attached to the Affidavit of Heirship for information sake, but it is not a way for the Will to be given legal status. The Affidavit of Heirship is signed by at least one person who knew the decedent's life history, is notarized, and is then filed with the county clerk.

The filed Affidavit of Heirship is often, but not universally, accepted as evidence that title to the assets passed to the persons named in the Affidavit of

Heirship. If any parties want to contest the information, they can. Once it has been on file for five years, the information in it is presumed to be true in any legal proceeding (but can still be disproved if the information is wrong).

An Affidavit of Heirship is not guaranteed to be the final act in settling a small an estate. Since it is not court approved, any interested person can impose a more complex procedure requiring court approval. If so, the Affidavit of Heirship is treated as non-binding evidence. This lack of guarantee is the Affidavit of Heirship's weakest point. It might be the cheapest probate option but if it does not work, other options might need to be revisited, so use this option with that understanding.

PART 15: About the Authors

Paul Premack practices with The Premack Law Office in its San Antonio office.

Paul is a member of the State Bar of Texas and the San Antonio Bar Association. He is a Life Fellow of the San Antonio Bar Foundation and of the Texas Bar College. Paul writes a weekly column for the San Antonio Express-News on legal issues. He has been published in the Texas Bar Journal and has been a presenter at many Legal Education programs. He serves on the Board of the Texas Chapter, National Academy of Elder Law Attorneys and is listed as a 2016 Super Lawyer.

Benjamin Premack practices with The Premack Law Office in its Seattle office.

Benjamin is a member of the Washington State and Colorado Bar Associations. His work has been published in the Wisconsin International Law Journal. Benjamin has presented before the Swedish Agency for Peace, Security and Development in Stockholm. He played an integral role in the establishment of the Work Program on Loss and Damage at the Secretariat of the United Nations Framework Convention on Climate Change. He has presented Seattle-area legal workshops on planning in non-traditional relationships.

Read more about the authors at WWW.PREMACK.COM

PART 16: Index